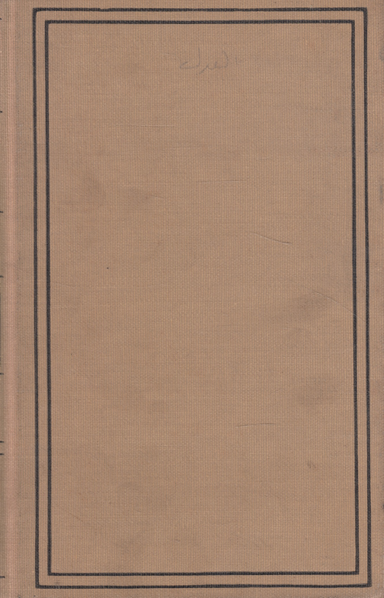








CASES DECIDED

IN

THE COURT OF CLAIMS

OF

THE UNITED STATES

DECEMBER 1, 1941, TO MARCH 31, 1942

WITH

REPORT OF DECISIONS OF THE SUPREME COURT IN COURT OF CLAIMS CASES

REPORTED BY

JAMES A. HOYT

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*Judge Green recalled to sit, hear, and determine all questions which may arise in cases heard by him.

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[2] Resigned as of March 31, 1942.



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LEGISLATION RELATING TO THE COURT OF CLAIMS

[PRIVATE LAW 306—77TH CONGRESS]

[CHAPTER 122—2D SESSION]

[H. R. 4179]

AN ACT

To confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claims of Allen Pope, his heirs or personal representatives, against the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction be, and the same is hereby, conferred upon the Court of Claims of the United States, notwithstanding any prior determination, any statute of limitations, release, or prior acceptance of partial allowance, to hear, determine, and render judgment upon the claims of Allen Pope, his heirs or personal representatives, against the United States, as described and in the manner set out in section 2 hereof, which claims arise out of the construction by him of a tunnel for the second high service of the water supply in the District of Columbia.

SEC. 2. The Court of Claims is hereby directed to determine and render judgment at contract rates upon the claims of the said Allen Pope, his heirs or personal representatives, for certain work performed for which he has not been paid, but of which the Government has received the use and benefit; namely, for the excavation and concrete work found by the court to have been performed by the said Pope in complying with certain orders of the contracting officer, whereby the plans for the work were so changed as to lower the upper "B" or "pay" line three inches, and as to omit the timber lagging from the side walls of the tunnel; and for the work of excavating materials which caved in over the tunnel arch and for filling such caved-in spaces with dry packing and grout, as directed by the contracting officer, the amount of

dry packing to be determined by the liquid method as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into the dry packing.

SEC. 3. Any suit brought under the provisions of this Act shall be instituted within one year from the date of the approval hereof, and the court shall consider as evidence in such suit any or all evidence heretofore taken by either party in the case of Allen Pope against the United States, numbered K-366, in the Court of Claims,* together with any additional evidence which may be taken.

SEC. 4. From any decision or judgment rendered in any suit presented under the authority of this Act, a writ of certiorari to the Supreme Court of the United States may be applied for by either party thereto, as is provided by law in other cases.

Approved, February 27, 1942.

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* See 76 C. Cls. 64; 81 C. Cls. 658; 86 C. Cls. 18; 303 U. S. 654, certiorari denied.

CASES DECIDED

IN

THE COURT OF CLAIMS

December 1, 1941, to March 31, 1942

THE NEZ PERCÉ TRIBE OF INDIANS v. THE UNITED STATES

[No. K–107. Decided October 6, 1941; Plaintiff's motion and defendant's motion for new trial overruled, January 5, 1942]

On the Proofs

Indian claims; treaties of June 11, 1855, and June 9, 1863; alleged failure to pay amounts due; duty of sovereign.—Plaintiff sued the defendant for $3,266,826.22, basing its claims on four items:

(1) Failure to pay to the tribe the amount received from the sale of lands within what is known as the "Old Agency Reserve" or the "Langford Claim";

(2) Failure to pay to the tribe money received from the sale of lands allotted erroneously to nonmembers of the tribe and later cancelled;

(3) Per capita payments erroneously made to nonmembers of the tribe;

(4) For gold mined and removed by nonmembers of the tribe from lands alleged to be within the plaintiff's reservation.

The case was before the Court under Rule 39(a), and it was *held*:

(1) That plaintiff was not entitled to recover the amount received from the sale of, or for the value of, the lands in the "Old Agency Reserve" which were purchased by the defendant.

(2) That plaintiff was entitled to recover the value of the number of acres of cancelled allotments which were opened to homestead entry by the proclamation of the President on November 8, 1895 (29 Stat. 873,876), with interest at 5 percent per annum.

(3) That plaintiff was entitled to recover whatever part of the $1,626,222 was paid to nonmembers of the tribe and for which the defendant has not accounted to the plaintiff, with interest at 5 percent per annum.

(4) That plaintiff was not entitled to recover the value of any gold removed from its reservation.

Same; no guarantee to exclude nonmembers of tribe.—Where there is no allegation that white people went upon plaintiff's lands at the direction of the defendant, or even at defendant's instigation; and where liability is predicated solely on the defendant's failure to keep out said white persons; it is *held* that from the language of the treaty of 1855 it cannot be inferred that the defendant intended to guarantee that no white men should reside on said reservation and that defendant should respond in damages if they did.

Same; duty of sovereign.—Independent of treaty, the defendant as the sovereign power was under the duty of protecting the plaintiff in the peaceful occupation and possession of its property but this duty goes no further than to use its forces to endeavor to prevent a threatened wrong and to afford plaintiff redress in its courts against the wrongdoer if such wrong is committed.

The Reporter's statement of the case:

Mr. F. M. Goodwin for the plaintiff. *Messrs. Lawrence Cake, C. C. Dill,* and *G. W. Jewett* were on the briefs.

Mr. Walter C. Shoup, with whom was *Mr. Assistant Attorney General Norman M. Littell,* for the defendant. *Mr. Raymond T. Nagle* was on the briefs.

The court made special findings of fact as follows:

1. Plaintiff's petition is filed under the authority of an act approved February 20, 1929 (45 Stat. 1249), conferring jurisdiction on this court "to hear, determine, adjudicate, and render final judgment" on plaintiff's claims as set out in the act.

2. The Nez Percé Tribe of Indians originally occupied an area in what is now northwestern Idaho, northeastern Oregon, and southeastern Washington, on the lower Snake River and its tributaries, between the Blue Mountains of Oregon and the Bitter Root Mountains of Idaho, a part of which area was ceded and the remainder reserved by them by their first treaty of June 11, 1855 (12 Stat. 957).

3. By the treaty of June 9, 1863, ratified April 17, 1867 (14 Stat. 647), the Nez Percé Tribe ceded their reservation under the treaty of 1855, *supra*, except a portion thereof which was set apart as their diminished reservation.

4. An agreement between the United States and the Nez Percé Tribe of Indians was concluded on May 1, 1893, and ratified by Congress on August 15, 1894 (28 Stat. 286, 326–331; Sen. Ex. Doc. No. 31, 53rd Cong., 2d sess., pp. 19–25, Cong. Doc. Series No. 3160).

Under the terms of this agreement all of the unallotted lands were ceded with certain reservations, among which was a tract of land described as follows:

> * * * Also that there shall be reserved from said cession the land described as follows: "Commencing at a point at the margin of Clearwater River, on the south side thereof, which is three hundred yards below where the middle thread of Lapwai Creek empties into said river; run thence up the margin of said Clearwater River at low-water mark, nine hundred yards to a point; run thence south two hundred and fifty yards to a point; thence southwesterly, in a line to the southeast corner of a stone building, partly finished as a church; thence west three hundred yards to a point; thence from said point northerly in a straight line to the point of beginning; * * *

These lands were purchased by the United States upon the performance of the conditions specified in the agreement.

5. In arriving at the price to be paid for the lands ceded by the agreement of 1893, the parties calculated that the total reservation comprised 756,968 acres, and that 182,234 acres had been allotted. The plaintiff reserved 32,660 acres of timber land and, except for the Old Agency Reserve, sold the balance to the defendant for $3.00 an acre, or a total consideration of $1,626,222. Among the 182,234 acres that had been allotted, there were 10,542.68 acres that had been erroneously allotted. These allotments were later cancelled. Of this acreage the defendant reallotted 3,336.94 acres to members of the Nez Percé Tribe, 74.55 acres were set apart for the Craig's Domain claim, and the balance was opened to homestead entry by Presidential Proclamation on November 8, 1895 (29 Stat. 873–876).

6. Under the terms of the agreement of 1893 the consideration to be paid for the lands ceded was to be paid to members of the plaintiff tribe per capita. Some portion of the funds distributed prior to the cancellation of the errone-

ous allotments was distributed to persons who were not members of the plaintiff tribe.

7. In 1860 gold was discovered on lands alleged to be within the lands reserved by the treaty of 1855. White men undertook to locate camps thereon and to extract the gold. Some effort was made by the defendant to exclude them from the lands, but these efforts were unsuccessful. Several camps were established and a large quantity of gold was extracted before execution of the agreement of 1893 ceding to the defendant all unallotted lands, with certain reservations. These settlements were not made with the permission of the plaintiff tribe and the superintendent and agent.

The court decided that the plaintiff was entitled to recover the value of the number of acres of cancelled allotments which were opened to homestead entry by the proclamation of the President on November 8, 1895 (29 Stat. 873–876), with interest at 5 percent per annum; that plaintiff was entitled also to recover whatever part of the $1,626,222 was paid to nonmembers of the tribe and for which the defendant has not accounted to the plaintiff, with interest at 5 percent per annum; and that plaintiff was not entitled to recover the amount received from the sale of or for the value of the lands in the Old Agency Reserve which were purchased by the defendant; and that plaintiff was not entitled to recover the value of any gold removed from its reservation.

WHITAKER, *Judge*, delivered the opinion of the court:

The plaintiff sues the defendant for $3,266,826.22, basing its claim on four items: (1) the failure to pay to the tribe the amount received from the sale of lands within what is known as the "Old Agency Reserve" or the "Langford Claim;" (2) failure to pay to the tribe money received from the sale of lands allotted erroneously to nonmembers of the tribe and later cancelled; (3) per capita payments erroneously made to nonmembers of the tribe; (4) for gold mined and removed by nonmembers of the tribe from lands alleged to be within the plaintiff's reservation.

The case is before us under rule 39 (a).

First Item

On June 11, 1855, a treaty between the parties was agreed upon, later ratified on March 8, 1859 (12 Stat. 957), under the terms of which a certain reservation was set apart to the plaintiff, and under which plaintiff relinquished its claim to all other lands. Later, in 1863, a treaty was negotiated between the parties, ratified on April 17, 1867 (14 Stat. 647), under which, in consideration of the sum of $262,500, the plaintiff ceded to the defendant all of its lands except a certain area therein described.

Finally, in 1893 an agreement was entered into between the parties, which was ratified by the Congress on August 15, 1894 (28 Stat. 286, 326–332), under which the plaintiff ceded to the defendant all of its unallotted lands, with certain reservations, for a consideration of $1,626,222. Among the lands reserved from the cession was a tract described as follows:

> * * * Also that there shall be reserved from said cession the land described as follows: "Commencing at a point at the margin of Clearwater River, on the south side thereof, which is three hundred yards below where the middle thread of Lapwai Creek empties into said river; run thence up the margin of said Clearwater River at low-water mark, nine hundred yards to a point; run thence south two hundred and fifty yards to a point; thence southwesterly, in a line to the southeast corner of a stone building, partly finished as a church; thence west three hundred yards to a point; thence from said point northerly in a straight line to the point of beginning; * * *

The plaintiff alleges that these lands were later sold by the United States and the proceeds thereof were deposited in the general funds of the Treasury of the United States, and it is alleged that the plaintiff has received no compensation therefor. Whether or not these allegations are true, plaintiff is not entitled to recover on this item, because in the article reserving these lands from the cession it is provided that the United States shall purchase them upon certain conditions, whereupon the right of occupancy of the tribe in the land "shall terminate and cease and the complete title

thereto immediately vest in the United States." The lands were purchased by the United States, the condition having been complied with, and upon their purchase, in accordance with the agreement, the right of occupancy of said Indians in said described tracts terminated and ceased and the complete title thereto immediately vested in the United States.

Second Item

By the treaty of 1863 the plaintiff relinquished to the United States all the lands previously reserved for their use and occupation by the treaty of 1855, except a certain described tract. This tract was reserved for them "for a home, and for the sole use and occupation of said tribe." The treaty provided for a survey of the lands and for the allotment of 20 tillable acres thereof to each male person of twenty-one years or over. These allotments were to be "set apart for the perpetual and exclusive use and benefit of such assignees and their heirs." It was also provided that the "residue of the land hereby reserved shall be held in common for pasturage for the sole use and benefit of the Indians."

After these, and perhaps other, allotments had been made, the plaintiff and the defendant entered into the agreement of 1893, under the terms of which the plaintiff ceded to the defendant "all the *unallotted* lands within the limits of said reservation," with certain reservations. It later developed that of the allotted lands not sold 10,542.68 acres had been erroneously allotted to persons who were not members of the Nez Percé tribe. Accordingly, these allotments were cancelled. Of the total of 10,542.68 acres of allotments which were cancelled, 3,336.94 acres were reallotted to members of the Nez Percé tribe. Of the balance, 5,867.5 acres were patented on homestead entries, 74.55 acres were set apart for the Craig's Domain Claim, and 1,263.69 acres are vacant. The plaintiff sues for the value of all the cancelled allotments, except those which were reallotted to members of the Nez Percé tribe.

We are of opinion that plaintiff is entitled to recover on this claim. The only lands ceded to the defendant by the plaintiff were the "unallotted" lands. The 10,542.68 acres had been allotted, although erroneously, and, therefore, were

not included in the cession. Title to these lands never passed from the plaintiff to the defendant. When these allotments were cancelled, title to the lands, therefore, reverted to the plaintiff, their original owner.

If there could be any doubt that these erroneously allotted lands were not ceded, the negotiations between the Indians and the defendant's commissioners leave no question about it. Throughout the negotiations they speak only of the unallotted lands. Nowhere is there a suggestion that any part of the allotted lands should be ceded. There was no suggestion that some of them may have been erroneously allotted, and, therefore, no exception of these from the lands retained by the plaintiff.

On the sixth day of council one of the Indians requested the commissioners to "bring the amount of the number of acres on the reservation before allotment was made and also the amount of land that has been allotted to the Indians." "Then," it was said, "we can find out how much there is on the outside of the allotments." The following day the commissioners reported as follows (Senate Ex. Doc. 31, p. 47):

	Acres
The reservation contains	756, 968
The allotments comprise	182, 234
Leaving a surplus of lands	574, 734
Reserved for wood and timber	64, 820
	509, 914
If the amount of timber land is reduced to 34,820 acres it will add to surplus	30, 000
And the surplus to be sold will amount to	539, 914

For these the commissioners originally proposed to pay a price of $2.50 an acre, but, after seven days of meeting in council, on the eighth day they finally agreed to pay $3.00 an acre. The price paid at $3.00 an acre was for 542,074 acres, a total of $1,626,222. This was the entire acreage in the reservation, except 32,660 acres reserved for timber lands and the 182,234 acres that had been allotted, which included the 10,542.68 acres that had been erroneously allotted. It follows that the Government did not acquire and did not pay for these 10,542.68 acres.

On November 8, 1895, the President issued a proclamation which, after reciting the cession of 1893, declared "that all of the unallotted and unreserved lands acquired from the Nez Percé Indians, by said agreement, will, at and after the hour of 12 o'clock, noon, (Pacific Standard time) on the 18th day of November 1895 and not before, be opened to settlement. * * *" The proclamation recited that the lands to be opened for settlement were particularly described in a schedule attached. This schedule is not before us, but it is evident it included the acreage in question because the report of the Assistant Secretary of the Interior in this case shows that of this acreage 5,867.5 acres have been patented in homestead entries.

This proclamation of the President was an expropriation of these lands for the benefit of the defendant, both the acreage later disposed of and the vacant land, for which the plaintiff is entitled to a money judgment under the jurisdictional act (45 Stat. 1249) conferring jurisdiction on this court to adjudicate—

> * * * all legal and equitable claims of whatsoever nature * * * arising under or growing out of the original Indian title * * * including all title, claim, or rights growing out of [the treaties above mentioned] * * * and more particularly as to the following claims: * * *
>
> 2. Claim for certain lands included in canceled allotments * * * and thereafter disposed of by the United States, said lands not being included in the area ceded by said treaties or said agreement of May 1, 1893. * * *

Third Item

Under the agreement of 1893 the defendant was obligated to pay to the individual members of the Nez Percé Tribe the $1,626,222 agreed to be paid for the lands ceded under the agreement. Plaintiff says that $41,550.05 of this amount was paid to persons not entitled thereto because the allotments of land to them had been erroneously made, because made to nonmembers of the tribe, and were later cancelled.

By article III of the agreement of 1893, it was provided that the consideration of $1,626,222 for the ceded lands should

be paid to the plaintiff Indians per capita. If some part of the money for distribution has been paid to nonmembers of the tribe, the plaintiff, of course, is entitled to recover it. In many instances, however, it is not clear from the report of the General Accounting Office, which is the only proof on this feature of the case, that the payments set out were payments to nonmembers of the tribe or their representatives.

As the case is submitted under rule 39 (a) it is not necessary for us to determine at this stage of the proceeding the amount paid to nonmembers of the tribe.

Fourth Item

Lastly, the plaintiff sues for the value of gold alleged to have been removed from the reservation by white people prior to the agreement of 1893. Plaintiff relies on the following portion of article II of the treaty of 1855, later reaffirmed by the agreement of 1893, which reads:

> All which tract shall be set apart, and, so far as necessary, surveyed and marked out for the exclusive use and benefit of said tribe as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent; * * *

There is no allegation that white people went upon plaintiff's lands at the direction of the defendant or even at its instigation. Liability is predicated solely on the defendant's failure to keep them out.

The purpose of the above provision was to set apart absolutely the lands described for the exclusive use and benefit of the plaintiff. The second clause, that no white man should be permitted to reside on the reservation, was inserted only to emphasize the statement in the first clause that the lands were set apart "for the exclusive use and benefit of said tribe." We are clearly of opinion that no intention can be gathered therefrom that the defendant intended to guarantee that no white man should reside thereon and that it should respond in damages if they did.

Independent of treaty, the defendant as the sovereign power was under the duty of protecting the plaintiff in the

peaceful occupation and possession of its property; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; but this duty, of course, goes no further than a duty to use its forces to endeavor to prevent a threatened wrong and to afford it redress in its courts against the wrongdoer if the wrong is committed. No one has ever asserted that because a person's rights are invaded by a stranger the sovereign is liable in damages for a failure to afford adequate protection. Cf. *Choctaw and Chickasaw Nations* v. *United States*, 75 C. Cls. 494. This is true even though the sovereign be grossly negligent in failing to afford the necessary protection against the threatened danger. The sovereign is not liable for failure to perform a governmental function. *Gianfortone* v. *City of New Orleans*, 61 Fed. 64; *City of New Orleans* v. *Abbagnato*, 62 Fed. 240, 245–246; *Campbell* v. *Montgomery*, 53 Ala. 527; *Western College* v. *Cleveland*, 12 Ohio St. 375; *Louisiana* v. *New Orleans*, 109 U. S. 285, 291, concurring opinion by Mr. Justice Bradley; and other cases collected in 13 A. L. R. 751, 23 A. L. R. 297, and 44 A. L. R. 1138.

We are satisfied that it was not intended by the treaty to impose on the defendant any greater duty to protect plaintiff in the peaceful occupation and possession of its property than already existed. Certainly there was not expressly assumed an obligation to respond in damages, if the protection afforded was inadequate; nor will such an obligation be implied unless such implication is inescapable. *Robinson* v. *Greeneville*, 42 Ohio St. 625; *Western College* v. *Cleveland*, *supra; Gianfortone* v. *New Orleans*, *supra*. The treaty says that white persons shall not be permitted to reside on the reservation, but it does not say that if they do the United States shall be liable in damages for any injury done by them.

In *Leighton* v. *United States*, 161 U. S. 291, 296, the court considered the liability of the United States and the Indian Tribe for depredations. It said that the obligation assumed by the Indians under treaty "to cease all hostilities against the persons and property of its [United States] citizens" was a promise "to keep the peace, and not a promise to pay if the peace is not kept." Here the United States said that white persons would not be permitted to reside on the reser-

vation, but it did not agree to pay damages inflicted if they did so. Cf. *Blackfeet, et al. Nations* v. *United States*, 81 C. Cls. 101, 119–123.

The agreement was intended to do no more than to make it as plain as possible that the reservation was intended for the sole use and benefit of the tribe and that the defendant would do what it could to effect that, or, failing in this, to afford plaintiff redress in its courts against the wrongdoer.

We are of opinion the plaintiff is not entitled to recover on this item.

It results that the plaintiff is entitled to recover the value of the number of acres of cancelled allotments which were opened to homestead entry by the proclamation of the President on November 8, 1895 (29 Stat. 873–876), with interest at 5 percent per annum; that plaintiff is entitled to recover whatever part of the $1,626,222 was paid to nonmembers of the tribe and for which the defendant has not accounted to the plaintiff, with interest at 5 percent per annum; that plaintiff is not entitled to recover the amount received from the sale of or for the value of the lands in the Old Agency Reserve which were purchased by the defendant; and that plaintiff is not entitled to recover the value of any gold removed from its reservation. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JOSEPH'S BAND OF THE NEZ PERCÉ TRIBE OF INDIANS v. THE UNITED STATES

[No. L–194. Decided October 6, 1941. Plaintiff's motion for new trial overruled January 5, 1942]

On the Proofs

Indian claims; treaty of 1855; title to land included in reservation.—**Where, on June 11, 1855, a treaty was concluded between the defendant and the Nez Percé Tribe of Indians, by which much** of the land of the tribe was ceded to the defendant, the land not ceded being expressly set aside as a reservation for the said

Syllabus

tribe; and where said treaty was signed on behalf of the Indians by Principal Chief Lawyer and the chiefs of the various bands, including Joseph, the chief of the plaintiff band, who was the third Indian signer; and where the land claimed in the instant suit was included in the Nez Perce reservation of said treaty; it is *held* that there was nothing in said treaty of 1855 which either recognized any title in plaintiff band to, or gave to that band or any other band title to, specific parts of the land reserved to the Nez Percé tribe by said treaty.

Same; authority of tribal chief to sign treaty.—The conduct of the then chief of the plaintiff band, the elder Joseph, in participating in the negotiations and signing the treaty of 1855 shows that there must have been power in the tribe to act as a whole with reference to all lands of the tribe or of any of its bands.

Same; immemorial possession.—Where claim of title to the Wallowa area is based on alleged immemorial possession by plaintiff band, it is *held* that it does not appear from the evidence that Joseph and his band ever had exclusive possession of said Wallowa area.

Same; treaty of 1863; dissenting minority bound by action of tribe.—Where in 1863 a treaty with the Nez Perce Indians was signed, reducing the reservation to a described area, and where in said treaty the land claimed in the instant suit, known as the Wallowa reservation, was included in the land relinquished to the defendant by the tribe; and where Joseph, the then chief of the plaintiff band, refused to sign said treaty or to recognize it is binding; it is *held* that the Nez Perce tribe, as an entity, had the power to make the said treaty of 1863 and that the dissenting minority, including the members of the plaintiff band, was bound by said treaty.

Same; recognition of title.—Where in 1873 upon the recommendation of the Commissioner of Indian Affairs the President, by Executive Order, withdrew from entry the Wallowa area and set it aside as a reservation for the "roaming Nez Perce Indians"; and where, however, the nontreaty Nez Perce Indians continued to roam and made no attempt to establish permanent homes in the Wallowa reservation; and where in 1875 the President thereupon revoked his order of 1873 and restored to the public domain the said area; it is *held* that said Executive Order of 1873 was not a recognition of a title then existing in plaintiff band.

Same; alternative claim not in petition.—Plaintiff's alternative claim for relief, the right to a pro rata share of the Nez Percé income and property under the treaties and agreements of the tribe with the United States, not having been set forth in plaintiff's petition was not properly before the court.

The Reporter's statement of the case:

Mr. F. M. Goodwin for the plaintiff. *Messrs. F. W. Clements*, *Lawrence H. Cake*, *C. C. Dill*, and *G. W. Jewett* were on the brief.

Mr. Walter C. Shoup, with whom was *Mr. Assistant Attorney General Norman M. Littell*, for the defendant. *Mr. Raymond T. Nagle* was on the brief.

The court made special findings of facts as follows:

1. This suit was filed pursuant to an act of Congress of February 20, 1929, 45 Stat. 1249, which so far as here material, reads as follows:

> That jurisdiction is hereby conferred on the Court of Claims, with the right of appeal by either party to the Supreme Court of the United States, notwithstanding lapse of time or statutes of limitation, to hear, determine, adjudicate, and render final judgment on all legal and equitable claims of whatsoever nature of the Nez Perce Tribe of Indians in Idaho, or of any band thereof, against the United States, arising under or growing out of the original Indian title, claim, or rights of the said Indian tribe or any band thereof, including all title, claim, or rights growing out of treaties of June 11, 1855 (Twelfth Statutes, page 957), and June 9, 1863 (one hundred and forty-eighth Statutes, page 673),[1] and an agreement of May 1, 1893, approved by Act of Congress of August 15, 1894 (Twenty-eighth Statutes, page 286), with the said Nez Perce Tribe or band of Indians, in connection with the Nez Perce Indian Reservation in the States of Idaho and Oregon, * * *
>
> SEC. 2. Any and all claims against the United States within the purview of this Act shall be forever barred unless suit or suits be instituted or petition, subject to amendment, be filed in the Court of Claims within five years from the date of this Act, and in any such suit or suits said Nez Perce Tribe of Indians, or any band thereof, shall be party or parties plaintiff and the United States shall be the party defendant. The petition of the said Indians shall be verified by the attorney or attorneys employed to prosecute such claim or claims, under contract with the Indians, approved in

[1] So in original. Reference is to 14 Stat. 647.

accordance with existing law, upon information and belief as to the facts therein alleged and no other verification shall be necessary. Official letters, papers, documents, records, maps, historical works, and affidavits in official files, or certified copies thereof, may be used in evidence and the departments of the Government shall give access to the attorney or attorneys of said Indians to such treaties, papers, maps, correspondence, reports, documents, or affidavits as they may require in the prosecution of any suit or suits instituted under this Act.

* * * * *

SEC. 4. Any bands of Indians associated with the Nez Perce Tribe deemed necessary to a final determination of any suit or suits brought hereunder may be joined therein as the court may order: Provided, That upon final determination of the court of any such suit or suits the Court of Claims shall have jurisdiction to fix and determine a reasonable fee not to exceed 10 per centum of the amount recovered, or in the event of any compromise settlement and adjustment of any of the foregoing claims by the Commissioner of Indian Affairs and the Secretary of the Interior, then such officers shall have jurisdiction to fix and determine a reasonable fee not to exceed 10 per centum of the amount secured in such settlement or adjustment, to be paid to the attorney or attorneys employed as herein provided, and such fees shall be paid out of any sum or sums adjudged to be due said tribe or bands, or any of them, and the balance of such sum or sums shall be placed in the Treasury of the United States to the credit of such tribes or bands where it shall draw interest at the rate of 4 per centum per annum. The amount of any judgment shall be placed in the Treasury of the United States to the credit of the Nez Perce Tribe of Indians and shall draw interest at the rate of 4 per centum per annum and shall be thereafter subject to appropriation by Congress for educational, health, industrial, and other purposes for the benefit of said Indians, including the purchase of land and building of homes, and no part of said judgment shall be paid out in per capita payments to said Indians.

2. The Nez Perce Tribe of Indians originally occupied an area in what is now northwestern Idaho, northeastern Oregon, and southeastern Washington, on the lower Snake River and its tributaries, between the Blue Mountains of

Oregon and the Bitter Root Mountains of Idaho. The Nez Perces all spoke the same language. They were sometimes classed under two geographical divisions, Upper Nez Perces and Lower Nez Perces. The tribe was divided into a number of bands. Until 1842 there was no head chief of the tribe, but each band had several chiefs, of whom one was regarded as the leader of the band. One of the bands of Nez Perce Indians came to be known as "Joseph's Band," named after the elder Chief Joseph, who was their chief in 1855, and who was succeeeded after his death in 1871 by his son, also known as Chief Joseph.

3. In 1842 the Indian Agent appointed an Indian known as Ellis as head chief of the whole Nez Perce Tribe. Some time after the death of Ellis, but prior to 1855, the chief of one of the bands, known as Lawyer, was appointed head chief by the Indian Agent. Lawyer was recognized as head chief both by the defendant and the Tribe when the treaty of 1855 was negotiated and signed, but some of the chiefs refused to recognize his authority in negotiating and signing the treaty of 1863.

Chief Joseph the elder had contended unsuccessfully against Lawyer for the office of head chief, but he took part in the negotiations and was the third Indian signer of the Treaty of 1855. He also attended the councils at which the Treaty of 1863 was negotiated, but refused to sign the treaty, as did some other prominent and some less prominent chiefs.

4. Treaties were concluded between the defendant and the Nez Perce Indians on June 11, 1855 and June 9, 1863. The Nez Perce Reservation, as described by the Treaty of 1855, included the Wallowa Valley. It was not included in the reservation as described by the Treaty of 1863, but was a part of the lands ceded to the defendant by that treaty. The reservation created by the treaty of 1863 was a relatively small area of land in what is now the state of Idaho.

5. The Wallowa Valley Reservation land, as described in finding 7 and as claimed by plaintiff band, never was the permanent home nor in the exclusive possession of Joseph and his band. At different times they had their peculiar home upon small portions of the land claimed, along the Imnaha River, on the Grande Ronde River near its mouth,

as well as upon land not herein claimed, viz, on the Snake River at the mouth of the Salmon River. Plaintiff band, in common with other Nez Perces resorted to the valley of the Wallowa River and the adjacent country, within what became a part of the reservation land under the Treaty of 1855, in the summer to fish, hunt, gather herbs and roots, and graze their herds.

6. After Chief Joseph the elder and the head chiefs of certain other bands, as well as other minor chiefs, refused to sign the Treaty of 1863, the Nez Perce tribe divided into two factions, the treaty and the nontreaty parties. The latter party was led by Chiefs Joseph, Looking Glass, Big Thunder, White Bird, and Eagle From the Light, who with their bands refused to recognize the treaty or to remove to the diminished reservation. They became known as the roaming or roving Nez Perces Indians. Following an investigation by a commission in 1873, their removal to the reservation was deemed inpracticable.

7. A departmental recommendation was submitted to the President and an Executive Order was issued in the following terms:

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
June 9, 1873.

The above diagram is intended to show a proposed reservation for the roaming Nez Perce Indians in the Wallowa Valley, in the State of Oregon. Said proposed reservation is indicated on the diagram by red lines, and is described as follows, viz:

Commencing at the right bank of the mouth of Grande Ronde River; thence up Snake River to a point due east of the southeast corner of township No. 1, south of the base line of the surveys in Oregon, in range No. 46 east of the Willamette meridian; thence from said point due west to the West Fork of the Wallowa River; thence down said West Fork to its junction with the Wallowa River; thence down said river to its confluence with the Grande Ronde River; thence down the last-named river to the place of beginning.

I respectfully recommend that the President be requested to order that the lands comprised within the above-described limits be withheld from entry and

settlement as public lands, and that the same be set apart as an Indian reservation, as indicated in my report to the department of this date.

EDWARD P. SMITH, *Commissioner*.

DEPARTMENT OF THE INTERIOR,
June 11, 1873.

Respectfully presented to the President, with the recommendation that he make the order above proposed by the Commissioner of Indian Affairs.

C. DELANO, *Secretary*.

EXECUTIVE MANSION, *June 16, 1873.*

It is hereby ordered that the tract of country above described be withheld from entry and settlement as public lands, and that the same be set apart as a reservation for the roaming Nez Perce Indians, as recommended by the Secretary of the Interior and the Commissioner of Indian Affairs.

U. S. GRANT.

8. During the period between June 16, 1873, and June 10, 1875, when the Executive Order of 1873 was in force, neither Chief Joseph's band nor any other nontreaty bands of Nez Perces settled in the Wallowa Reservation. They continued their former roving over the country, including Wallowa Valley. The purpose of the Executive Order having failed, the Indian Office recommended its revocation and the President issued the Revocation Order of June 10, 1875, which reads as follows:

EXECUTIVE MANSION, *June 10, 1875.*

It is hereby ordered that the order, dated June 16, 1873, withdrawing from sale and settlement and setting apart the Wallawa Valley, in Oregon, described as follows: "* * *" as an Indian reservation, is hereby revoked and annulled; and the said described tract of country is hereby restored to the public domain.

U. S. GRANT.

9. Following the Executive Order of 1875, the Wallowa lands having been restored to the public domain, white settlers moved in and serious conflicts between them and the Indians followed, with fatalities on both sides. General Howard, commanding a division of the United States Army, was di-

rected to remove the roving Nez Perces, by force if necessary, to the tribal reservation as defined by the Treaty of 1863. In May 1877, councils were held with Chief Joseph the younger, the son of and successor to Chief Joseph the elder who had died in 1871, and with Chiefs Looking Glass and White Bird, who agreed that their bands would remove to the reservation peaceably. However, before this was done, further fatal conflicts occurred, the soldiers attacked the Indians, pursued them and finally captured Joseph and his followers in the Bear Paw Mountains in Montana in October 1877. Joseph's band was thereafter removed to Oklahoma and in 1883 and 1884 the survivors, about 300, were finally removed, about one-half to the Nez Perce Reservation in Idaho, and the remainder to the Colville Reservation in Washington. Joseph elected to go to Colville.

10. Plaintiff band, as such, was not a party to and was not intended to have benefits under treaties or agreements between the defendant and the Nez Perce Indians.

11. It is not proved that members of plaintiff band were, as such, denied the benefits of treaties or agreements between the defendant and the Nez Perce Indians.

12. It is not proved that any member of plaintiff band, as such, failed to receive benefits under treaties or agreements except by his voluntary refusal to accept such benefits.

The court decided that the plaintiff was not entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

This suit is brought by plaintiff band of the Nez Perce Tribe of Indians under a special act of Congress (set out in finding 1), conferring jurisdiction on this court to determine the claims of the Nez Perce Tribe of Indians, or any band thereof, arising under or growing out of the original Indian title, claim or right, including all rights growing out of treaties of June 11, 1855, and June 9, 1863. Plaintiff's claim is that it was the exclusive owner of a tract known as the Wallowa Valley, in what is now the State of Oregon, and that it was deprived of that land by the defendant without its consent and without compensa-

tion. The claimed land is much more than the valley of the Wallowa River, as it includes all the land described in the Executive Order setting up the Wallowa Valley reservation hereinafter discussed.

The Nez Perce Tribe of Indians was made up of several separate bands, each with its own chief or chiefs. Geographically, they were divided into the Upper Nez Perces and the Lower Nez Perces. Joseph's Band, so named after its chief at the time that the treaties here of interest were made, belonged to the Lower Nez Perces. This band at different times dwelt along the Salmon and Snake Rivers, on the Imnaha, and on the Grande Ronde near its mouth. They, with other Nez Perces, resorted to the valley of the Wallowa River and to nearby country in the summer for hunting, fishing, and grazing.

Until 1842 there had been no chief of the whole tribe. In that year an Indian known as Ellis was named head chief by the Indian agent for the territory. Some time prior to 1855 an Indian named Lawyer had come to be recognized as head chief by most of the tribe and he was so treated by the Government's commissioners in negotiating for the treaties of 1855 and 1863.

On June 11, 1855, a treaty was concluded between the defendant and the Nez Perce Tribe of Indians, by which much of the land of the tribe was ceded to the defendant, the land not ceded being expressly reserved for a reservation for the Nez Perce Indians. The treaty was signed on behalf of the Indians by Lawyer and the chiefs of the various bands, including Joseph who was the third Indian signer. The land here claimed by plaintiff was included in the Nez Perce reservation of the 1855 treaty.

In 1863 another treaty with the Nez Perce Indians was signed, reducing the area of the reservation to a described area in what became the State of Idaho. Included in the land relinquished to the defendant by that treaty was the land described in the findings as the Wallowa reservation. Joseph refused to sign the treaty or to recognize it as binding upon him, disclaiming any authority in Lawyer or the other chiefs to act for his band. Joseph's band and the followers of some other chiefs who had not agreed to the

treaty refused to move to the treaty reservation and continued to roam over the country as they had previously done.

In 1873, upon recommendation of the Commissioner of Indian Affairs, the President, by executive order, withdrew from entry the Wallowa area and set it aside as a reservation for the "roaming Nez Perce Indians." However, the nontreaty Nez Perces continued to roam and made no attempt to establish permanent homes in the Wallowa reservation. In 1875 the President revoked his order of 1873 and restored the land covered by it to the public domain.

After the revocation in 1875 of the order reserving Wallowa from entry, white settlers moved in and conflicts ensued, with fatalities on both sides. Efforts were made to induce the younger chief Joseph, who had succeeded his father, and his band to move to the reservation of the 1863 treaty. These efforts seemed to be about to succeed when further fatalities occurred, defendant's troops intervened, and open war followed. The Indians were finally captured in Montana in 1876, and were taken first to Oklahoma, and then in 1885 some to the Nez Perce Reservation in Idaho and some to the Colville Reservation in Washington.

Plaintiff's contentions here are that Joseph's band owned the Wallowa area, that plaintiff's title was recognized by the treaty of 1855, that the treaty of 1863 could not and did not lawfully deprive it of its property because it did not consent thereto, and that it is entitled to compensation for the land taken; or in the alternative, that in the treaty of 1855 it obtained recognition of its title and surrendered the title to the Nez Perce Tribe generally, so that the tribe could and did, without Joseph's consent, effectively cede Wallowa to the defendant by the treaty of 1863, in which event plaintiff claims that it is entitled to receive its pro rata share in the consideration paid to the Nez Perces and to receive compensation for the allotments in the Nez Perce Reservation which it should have been given and never obtained.

Plaintiff encounters at the outset the difficulty of establishing title to the Wallowa area in Joseph's band, as distinguished from the tribe as a whole, a difficulty which its

evidence does not overcome. Claim of title is based on its alleged immemorial possession of Wallowa. But it does not appear from the evidence that Joseph and his band ever had exclusive possession of the Wallowa area. What does appear is that Joseph and his band made their peculiar home at different periods in the region around the mouth of the Salmon, on the Snake River, on the Imnaha River, and on the Grande Ronde River near its mouth. The latter two locations are within the Wallowa area. In the summer Joseph's band went to the interior of the Wallowa area for the purpose of hunting, fishing, and grazing, but other bands of Nez Perce Indians regularly resorted there for the same purpose.

There was nothing in the treaty of 1855 which either recognized any title to the Wallowa area in Joseph's band or gave to that band or any other band title to specific parts of the lands reserved to the Nez Perce Tribe by that treaty. Indeed the elder Joseph's conduct in participating in the negotiation of and signing the treaty of 1855 shows that there must have been power in the tribe to act as a whole with reference to all lands of the tribe or any of its bands. If not, Joseph in that treaty would have been relinquishing lands which he and his band did not own, since none of the land now claimed to have been immemorially occupied by Joseph's band was relinquished in that treaty.

We conclude that the Nez Perce Tribe, as an entity, had the power to make the treaty of 1863 and that the dissenting minority, including the members of plaintiff band and the other nontreaty Nez Perces, was bound by that treaty.

Plaintiff does not, and could not, found its claim on the executive order of 1873. That order is offered only as a recognition of a title then existing in plaintiff. It was not such a recognition. It was for all the nontreaty or "roaming" Nez Perces, and not for Joseph's band alone.

Plaintiff's alternative claim for relief, viz, the right to a pro rata share of the Nez Perce tribal income and property under the treaties and agreements of the tribe with the United States, is not set forth in its petition, and is not properly before the court. Further, it is not proved that

such benefits were denied to any member of plaintiff's band, because he was such a member, if he was willing to accept them.

In our consideration and decision of this case we have not been unaware of the fact that to assimilate the political organization of a tribe of Indians such as the Nez Perces at the time of the treaties here in question, to the political organization of white men, is a procrustean process. The tribal organization was, no doubt, loose and informal. The necessity for its becoming more definite, or being treated as if it were more conventional, according to white men's standards, arose from the white man's encroachments. There was no head chief of the tribe until the white men needed such a chief. It is probable, though, that the white man's need was also the Indian's need, once the white man had come. If "treaties" could not have been made, the alternative would no doubt have been worse for the Indians.

The treaties themselves, under consideration here, were by no means voluntary agreements between equals. Perhaps treaties seldom are, or were, even as between white men, and even before the current plague of "treaties." But the negotiations for the treaty of 1863, with the giving of presents, the reiterated protestations to the Indians of the Government's unselfish motives, the cajoling and threatening of the dissident chiefs, and the complete insistence that the treaty be made as the Government desired it, and with no compromise, does not make pleasant reading. In these respects this negotiation probably did not distinguish itself among the numerous councils at which treaties with Indians were made.

This method, such as it was, was the Government's then method of dealing with the Indians, and hence these treaties define the legal rights of the Indians and the Government. It follows that, though the discontent of Joseph and his brethren was natural and understandable, the present remnant of his band has no basis for suit.

The petition will be dismissed. It is so ordered.

JONES, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

Reporter's Statement of the Case

THE WARM SPRINGS TRIBE OF INDIANS OF OREGON v. THE UNITED STATES

[No. M-112. Decided November 3, 1941. Plaintiff's motion for new trial overruled and findings amended February 2, 1942]

On the Proofs

Indian claims; boundaries of reservation set aside for plaintiff tribe under the treaty of 1855.—Under the jurisdictional act of December 23, 1930 (46 Stat. 1033), authorizing the Court of Claims to hear, determine, adjudicate and render judgment on all legal and equitable claims of whatsoever nature of the Warm Springs Tribe of Indians or of any band thereof against the United States, arising under or growing out of or incident to the treaties of June 25, 1855 (12 Stat. 963), and of November 15, 1865 (14 Stat. 751), or either of them, notwithstanding the lapse of time and notwithstanding the provisions of the Act of June 6, 1894 (28 Stat. 86), it is *held:*

1. That the northern boundary of the reservation set aside for the Warm Springs Tribe of Indians by the said treaty of 1855 runs from McQuinn's 30-mile post at Little Dark Butte southeastwardly along the line established by McQuinn to McQuinn's 7½-mile post, and thence in a straight line to the starting point on the De Chutes River established by Handley;

2. That the western boundary of said reservation is the western boundary established by McQuinn;

3. That the plaintiff is entitled to recover the value of the lands between these boundaries and the northern and western boundaries established by Handley and Campbell;

4. That the plaintiff is not entitled to recover on its claims involving amounts agreed to be spent by defendant for the benefit of the Indians and for the erection of certain buildings and for other purposes, where it is shown by the proofs that far more money had been spent than was called for by the treaty;

5. That there is no proof that the bands named in the proviso to the treaty of 1855 met in council and expressed a desire that some other reservation should be selected for them, as required by said proviso.

The Reporter's statement of the case:

Mr. F. M. Goodwin for the plaintiff. *Messrs. Lawrence Cake, Francis B. Galloway, William S. Lewis, A. R. Serven,* and *John G. Carter* were on the briefs.

Mr. Charles H. Small, with whom was *Mr. Assistant Attorney General Norman M. Littell,* for the defendant. *Mr. Raymond T. Nagle* was on the brief.

The decision in this case was filed November 3, 1941. A motion for new trial was filed by the plaintiff on the ground that the court in its opinion fixed incorrectly the southern boundary of the reservation in question. On February 2, 1942, said motion was in all respects overruled.

However, the findings of fact filed on November 3, 1941, were on the court's own motion amended by adding a finding (13–a), as indicated.

The court made special findings of fact as follows:

1. This case is before the Court under the jurisdictional act of December 23, 1930 (46 Stat. 1033), which authorizes the Court to hear, determine, adjudicate and render judgment on all legal and equitable claims of whatsoever nature of the Warm Springs Tribe of Indians or of any band thereof against the United States, arising under or growing out of or incident to the treaties of June 25, 1855 (12 Stat. 963), and of November 15, 1865 (14 Stat. 751), or either of them, notwithstanding the lapse of time and notwithstanding the provisions of the act of June 6, 1894 (28 Stat. 86).

2. The Warm Springs Tribe of Indians occupied a large area of land in Oregon south of the Columbia River and east of the Cascade Mountains, chiefly along the De Chutes River and its tributaries. They are described in governmental literature and reports as the Taih or Upper De Chutes Band of Walla Wallas, the Wyam or Lower De Chutes Band of Walla Wallas, the Tenino Band, the Dock Spus or John Day's River Band of Walla Wallas, and several bands of Wascoes or Dalles Indians, all of whom were confederated together by the United States and described as the Warm Springs Tribe of Indians.

3. The treaty of June 25, 1855 (12 Stat. 963), was negotiated by Joel Palmer, acting for and on behalf of the United States, and by the chiefs and headmen of the bands of Indians known as the Warm Springs Tribe of Indians. It was negotiated at a time of Indian hostilities, at a place removed some fifty miles from the nearest boundary of the Indian reservation described in the treaty as set apart for the plaintiff.

Palmer had but slight knowledge of the country and its topography, having passed through it but once. The plaintiff was familiar with it to a somewhat greater extent, having roamed over it to hunt, fish, and gather roots and berries.

At the time it was negotiated Palmer exhibited to the Council a sketch of the territory, filed in this case as enclosure No. 47 to the report of the Secretary of the Interior, dated November 2, 1933, which is reproduced herein and attached as appendix No. 1 to this opinion.

4. The Mutton Mountains run from southwest to northeast. The northeast terminus of these mountains is on the De Chutes River between the mouths of Antoken and Eagle Creeks. There is a range of high lands running from the Cascade Mountains on the west, southeastwardly toward the De Chutes River in a fairly uniform course, which forms a well defined divide between the White River system on the north and the Warm Springs system on the south. The existence of this divide and its general course was known to the parties at the time the treaty was signed.

About 8 or 9 miles west of the De Chutes River this divide breaks up into spurs, one running northeastwardly, and another southeastwardly. From this point to the De Chutes River there is no continuous east and west divide, although from the point where the east and west divide breaks up into spurs more than one divide can be followed to the De Chutes River. This region is traversed by the Antoken, Eagle, Nena and Wapinitia Creeks, which empty into neither the Warm Springs River nor the White River, but into the De Chutes River.

5. About two years after the treaty was negotiated and signed Indian Agent R. R. Thompson, together with the principal chiefs and headmen of the bands, made an exploration of the reservation. At this time Thompson pointed out to the Indians his idea of the general course of the northern boundary.

No reservation was ever selected by the Indians other than the reservation described in the treaty.

Before 1859 practically all of the Indians who were parties to the above-mentioned treaty had been settled upon the reservation described in the treaty.

6. In 1871 a survey of a portion of the northern boundary was made by T. B. Handley, United States Surveyor, who ran the line from a certain point on the De Chutes River to his thirty-one mile post. Later, the remainder of the northern boundary was run by R. T. Campbell from Handley's twenty-six mile post, due west to the Cascade Mountains, to the Handley-Campbell 36-mile post; thence Campbell ran the western boundary in a direct line to Mt. Jefferson.

7. In 1887 another survey of the northern boundary was run by John A. McQuinn. McQuinn originally established his starting point on the De Chutes River 20 chains south of the starting point established by Handley. But, on account of the opposition of the Indians, he later determined upon another point between the mouths of Nena and Eagle Creeks. From this point he ran southwestwardly in a straight line to his 7½-mile post, which was located at a tree alleged to have been blazed by Indian Agent Thompson as being on the northern boundary of the reservation pointed out by him to the Indians. From this point McQuinn's survey ran in a straight line northwestwardly to his 30-mile post at Little Dark Butte on the Cascade Mountains.

There is reproduced herein and attached as appendix No. 2 to this opinion a diagram showing the Handley-Campbell survey and the McQuinn survey, and also the topography of the country on the northern and western boundaries (filed in this case as enclosure No. 49 to the report of the Secretary of the Interior dated November 2, 1933).

8. In 1888 a representative of the General Land Office and a representative of the Indian Office, H. B. Martin and George W. Gordon, appointed to investigate the two surveys and report on which one more nearly conformed to the treaty, reported (S. Ex. Docs. Vol. 7, No. 70, 50th Cong., 1st sess., 1887–1888) that the Handley line more nearly conformed thereto, but that it materially varied from the boundary as described in the treaty. Attached to their report was a diagram giving their idea of the true course of the northern boundary, which coincided in some respects with Handley's

line, and in other respects with McQuinn's line, but varied materially from both.

9. In 1889 the line surveyed by McQuinn was adopted by the Department of the Interior as the true northern boundary of the reservation.

10. In 1890 a Commission was appointed under authority of an act of Congress (26 Stat. 336, 355) to investigate the various claims as to the true northern boundary. This commission reported that the Handley-Campbell line was the true northern boundary, and Congress on June 6, 1894, passed an act (28 Stat. 86) establishing this boundary as the true northern boundary of the reservation.

11. In 1917 (39 Stat. 969) Congress appropriated the sum of $5,000 for a further investigation into the question of the true northern boundary. Pursuant thereto Fred Mensch, United States Surveyor, investigated the question and reported that the McQuinn survey was the correct northern boundary of the reservation.

12. In 1919 the Commissioner of the General Land Office reviewed the Mensch report and concluded that the Handley-Campbell line was the true northern boundary.

13. The true northern boundary of the reservation runs from the 7½-mile post of the McQuinn survey in a direct line to his 30-mile post at Little Dark Butte in the Cascade Mountains. From McQuinn's 7½-mile post it runs in a direct line to the point in the middle of the channel of the De Chutes River established by Handley as his initial point. The western boundary of the reservation runs from McQuinn's northwest corner in a direct line to the summit of Mt. Jefferson.

[**13a.** The southern boundary of the reservation runs from Mt. Jefferson along the Jefferson Creek until this creek empties into the Metolius River; thence along this River to its junction with the De Chutes River. The eastern boundary runs from the junction of the Metolius River and the De Chutes River northernly along the De Chutes River to Handley's initial point in the middle of the channel of the De Chutes River, said point being "opposite the eastern termination of a range of high lands usually known as the Mutton Mountains."]

14. Pursuant to the provisions of articles 2, 3, and 4 of the treaty of June 25, 1855 (12 Stat. 963), the United States has disbursed for the benefit of plaintiff Indian tribe the sum of $313,682.72.

15. Pursuant to the provisions of the treaty of November 15, 1865 (14 Stat. 751), the United States has disbursed for the benefit of plaintiff Indian tribe the sum of $3,500.00.

The court decided (1) that the northern boundary runs from McQuinn's 30-mile post at Little Dark Butte southeastwardly along the line established by him to his 7½-mile post, and thence in a straight line to the starting point on the De Chutes River established by Handley; (2) that the western boundary is the western boundary established by McQuinn; (3) that the plaintiff was entitled to recover the value of the lands between these boundaries and the northern and western boundaries established by Handley and Campbell; and (4) the plaintiff was not entitled to recover on its other claims.

WHITAKER, *Judge*, delivered the opinion of the court:

By the treaty of June 25, 1855 (12 Stat. 963), the plaintiff Indians ceded to the United States all the lands to which they laid claim, except a certain tract which was set apart for their exclusive use. This tract is described as follows:

> Commencing in the middle of the channel of the De Chutes River opposite the eastern termination of a range of high lands usually known as the Mutton Mountains; thence westerly to the summit of said range, along the divide to its connection with the Cascade Mountains; thence to the summit of said mountains; thence southerly to Mount Jefferson; thence down the main branch of De Chutes River; heading in this peak, to its junction with De Chutes River; and thence down the middle of the channel of said river to the place of beginning.

The setting apart of the above-described lands as a reservation for them was, however, subject to the following proviso:

> *Provided, however*, That prior to the removal of said Indians to said reservation, and before any improvements contemplated by this treaty shall have been com-

> menced, that if the three principal bands, to wit: the Wascopum, Taih or Upper De Chutes, and the Lower De Chutes bands of Walla-Wallas shall express in council a desire that some other reservation may be selected for them, that the three bands named may select each three persons of their respective bands, who with the superintendent of Indian Affairs or agent as may by him be directed, shall proceed to examine, and if another location can be selected, better suited to the condition and wants of said Indians, that is unoccupied by the whites, and upon which the board of commissioners thus selected may agree, the same shall be declared a reservation for said Indians, instead of the tract named in this treaty.

The plaintiff alleges that in pursuance of the agreement contained in this proviso another tract was selected. This tract embraces the reservation which the defendant claims is the one described above and, in addition, a very large territory, some three or four times larger.

1. The first question presented is whether or not the tribe did in fact select a reservation other than the one above described.

There is no proof whatever in the record that the bands named in the proviso met in council and expressed a desire that some other reservation should be selected for them, as the treaty required. The extent of plaintiff's proof is that Indian Agent R. R. Thompson, together with the chiefs and a number of the principal men of the bands included in the treaty, went upon the reservation and that there Thompson pointed out to them its boundaries. Plaintiff's proof, therefore, is not that another reservation was selected, but only that the boundaries of the reservation described in the treaty, as pointed out to them by the Indian Agent, were not the boundaries contended for by the defendant. There is no proof that the Indians selected any reservation other than that described in the treaty. Since no other reservation was selected, the plaintiff is bound by the description of the reservation as contained in the treaty.

The trip of the Indian Agent and the chiefs and principal men of the tribes to the reservation was made some two years after the treaty was signed. Even if it be true that on this trip the Indian Agent pointed out to them boundaries other

than those described in the treaty, this cannot vary the terms of that written instrument accepted by them two years before. There is no proof nor allegation that these boundaries were pointed out to them before the treaty was signed.

Moreover, plaintiff's evidence of what happened on this trip is unsatisfactory. At the time testimony in this case was taken there was but one person living who had accompanied the Indian Agent on this trip, one Albert Kuckup, 100 years old. He testified that the Indian Agent pointed out to them as their reservation the lands marked in green on the map filed as exhibit "B" to plaintiff's petition, beginning at Little Dark Butte on the summit of the Cascade Range; running thence southwardly through Olallie Butte, Mt. Jefferson, Three Fingered Jack, The Three Sisters, to Koo-See Wah Tum or Horse Lake; and thence south and east to the Paulina Mountains; thence northwardly through Powell Butte, Grizzly Butte, How-Sash, and Shnip-Shee or Bake Oven; thence westwardly to the point of beginning. Even though this would be material, if true, it is evident from his testimony and from the testimony of other witnesses for the plaintiff that this trip was not for the purpose of selecting some other reservation, but for the purpose of exploring the reservation described in the treaty.

This is also evident from Thompson's report on the trip to Joel Palmer, Superintendent of Indian Affairs for the Oregon territory. In the beginning of his letter he stated that he had just returned from "an exploration of the Wasco or Warm Springs reservation." Thompson says nothing in his report about exploring any part of the country other than the reservation which the defendant insists was set apart for them. From his letter it would appear that the purpose of the trip was primarily to select grounds for the Indian settlement. He says that for this purpose they selected two places south of Warm Springs, one on the She-tike Creek, and another in a valley about two miles west, where the She-tike empties into the De Chutes River. Both of these settlements are within the reservation which the defendant contends was set apart for them. (See exhibit "B" to plaintiff's petition.)

The treaty of 1855 contained a proviso that the Indians

should have the exclusive right to fish in the streams running through or bordering the reservation; and also, "at all other usual and accustomed stations, in common with citizens of the United States," they were to have "the privilege of hunting, gathering roots and berries, and pasturing their stock on unclaimed lands, in common with citizens." It is not at all clear from Kuckup's testimony whether the land pointed out to the exploring party was the land set apart to them as a reservation, as they claim, or were the lands in which they had a right to hunt and fish and gather roots and berries. According to the testimony, the Indians did hunt and fish and gather berries within the territory described by Kuckup during the summer, but in the winter they returned to the settlements selected for them within the boundaries of the reservation as claimed by the defendant.

Plaintiff introduced other witnesses who testified to the boundaries of the reservation as reported to them by this delegation, or to boundary marks which they had seen on the ground; but their testimony adds nothing to the testimony of Kuckup.

The plaintiff's proof completely fails to establish the selection of any reservation other than that described in the treaty.

2. The next question presented is the boundaries of the reservation described in the treaty. The question of the southern and eastern boundaries is comparatively easy of determination. The defendant contends that the southern boundary begins at the headwaters of Jefferson Creek in Mt. Jefferson, and runs thence along this creek to the Metolius River, and thence along this river to its junction with the De Chutes River. The plaintiff contends that it begins at the headwaters of a stream rising in The Three Sisters, and running thence with that stream to its junction with the De Chutes River. We think defendant's contention is correct. The boundaries as described in the treaty read in part as follows:

> * * * thence southerly to Mount Jefferson; thence down the main branch of De Chutes River; [,] heading in this peak, to its junction with De Chutes River. * * *

The plaintiff says that the main branch of the De Chutes River does not rise in Mt. Jefferson, but rises in The Three Sisters and, therefore, that we should disregard Mt. Jefferson as the southern terminus of the western boundary, and continue that boundary to The Three Sisters.

It is true the stream rising in Mt. Jefferson is not designated on the map filed as exhibit "B" to plaintiff's petition as a branch of the De Chutes River, but, nevertheless, the stream there rising empties into the De Chutes River, and well might have been thought of as a branch thereof. This must have been the stream in the minds of the parties when the treaty was drawn because it is perfectly clear that the southern terminus of the western boundary of the reservation is Mt. Jefferson, and not The Three Sisters, which is about twice as far from the northern terminus of the western boundary as is Mt. Jefferson.

If it be correct to say that Mt. Jefferson is the southern terminus of the western boundary, then it follows necessarily that the southern boundary of the reservation runs from Mt. Jefferson along the Jefferson Creek until it empties into the Metolius River, thence along this river to its junction with the De Chutes River, and that the eastern boundary runs northwardly up the De Chutes River to the terminus of the eastern boundary.

3. The proper location of the northern boundary is much more difficult to determine.

It was originally surveyed to within several miles of the western boundary by T. B. Handley in 1871. Later his survey was extended by Campbell from Handley's 26-mile post in a due west course to the summit of the Cascade Mountains. The Indians were much dissatisfied with these surveys and, accordingly, on December 17, 1886, a new survey was ordered, which was made by John A. McQuinn in the following year. His survey included a substantial amount of land in addition to that included by Handley.

The white settlers were dissatisfied with this survey and, to settle the dispute, the General Land Office and the Indian Office ordered representatives of their two offices, H. B. Martin and George W. Gordon, to determine which line "would

nearest conform to the treaty." They reported that the Handley line "more nearly conforms to the requirements and conditions of the treaty, but that at certain places he is materially at variance with its terms and intentions." They recommended a line which conformed in part with the Handley line and in part with the McQuinn line, but which was at variance with both in material respects. The McQuinn line was substantially in accord with the claims of the Indians and, to satisfy them, the Department of the Interior on July 19, 1889 approved the line as established by him.

Following this, in 1890 (26 Stat. 336, 355) Congress authorized the appointment of a commission—

> * * * whose duty it shall be to visit and thoroughly investigate and determine as to the correct location of the northern line of the Warm Springs Indian Reservation, in the State of Oregon, the same to be located according to the terms of the treaty of June twenty-fifth, eighteen hundred and fifty-five.

The Commission appointed pursuant thereto filed a detailed report on June 8, 1891, in which they said:

> That the line known as the McQuinn line, as surveyed and run, in no respect conforms to the said treaty of 1855, and is not the line of the northern boundary of the Warm Springs Reservation or of any part thereof. That the line known as the Handley line, as surveyed and run, substantially and practically conforms to the calls of the said treaty of 1855 from the initial point of said line up to and including the twenty-sixth mile thereof.
>
> * * * * *
>
> It is therefore considered and declared by the Commission that the northern boundary of the Warm Springs Indian Reservation, in the State of Oregon, is that part of the line run and surveyed by T. B. Handley in the year 1871, from the initial point up to and including the twenty-sixth mile thereof, thence in a due west course to the summit of the Cascade Mountains.

On the incoming of this report, Congress on June 6, 1894 passed an act (28 Stat. 86) which provided:

> * * * That the true north boundary line of the Warm Springs Indian Reservation * * * is hereby declared

> to be that part of the line run and surveyed by T. B. Handley, in the year eighteen hundred and seventy-one, from the initial point up to and including the twenty-sixth mile thereof; thence in a due west course to the summit of the Cascade Mountains, as found by the commissioners, Mark A. Fullerton, William H. H. Dufur, and James F. Payne. * * *

Notwithstanding such congressional adoption of this line, the appropriation act of March 2, 1917 (39 Stat. 969) appropriated $5,000—

> * * * for an investigation and report on the merits of the claim of the Indians of the Warm Springs Reservation in Oregon to additional land arising from alleged erroneous surveys of the north and west boundaries of their reservation * * * and the Secretary of the Interior is hereby authorized to make such surveys or resurveys as may be necessary to complete said investigation and report.

Pursuant thereto United States Surveyor Fred Mensch was appointed to make this investigation. He reported on January 16, 1919, going into the controversy in detail. He criticized the Handley survey in a number of respects, and concluded that the McQuinn line was the proper northern boundary.

Following this the Commissioner of the General Land Office filed a detailed report criticizing the Mensch report, and concluded that the plaintiff was not "entitled to any land or to any indemnity under the terms of the treaty of June 25, 1855, as construed by Congress in the act of June 6, 1894, outside of the present Handley-Campbell north and west boundaries of said reservation."

Lastly, Congress on December 23, 1930, passed an act (46 Stat. 1033) conferring jurisdiction on this court to adjudicate the claims of the Indians—

> * * * notwithstanding the provisions of the Act of June 6, 1894 (Twenty-eighth Statutes, page 86) * * *,

under which the Handley-Warm Springs Commission line was adopted.

It will thus be seen that we are confronted with a problem quite difficult of solution.

The treaty defines the northern boundary as follows:

> Commencing in the middle of the channel of the De Chutes River opposite the eastern termination of a range of high lands usually known as the Mutton Mountains; thence westerly to the summit of said range, along the divide to its connection with the Cascade Mountains; thence to the summit of said mountains.

In establishing this line two difficulties are met with: (1) the determination of the point in the De Chutes River "opposite the eastern termination of a range of high lands usually known as the Mutton Mountains"; and (2) what was meant by the phrase "along the divide to its connection with the Cascade Mountains."

In the region there is one main divide, that between the White River and its tributaries on the north, and the Warm Springs River and its tributaries on the south. It seems evident that the northern boundary was intended to run along this divide, and it would seem that, having established the starting point, it would be fairly simple to run the line to its western terminus. Difficulty, however, is encountered due to the fact that at a point about 18 miles from the Cascade Mountains on the west the main divide between the Warm Springs and White River systems divides into spurs, some running northwardly and others southwardly to, or approximately to, the De Chutes River. In this territory there are a number of creeks which flow into neither the White River nor the Warm Springs River, but into the De Chutes River on the east, so that there is no continuous east and west divide running the entire distance from the De Chutes River to the Cascade Mountains (See particularly the map filed as exhibit "B" to plaintiff's petition, the topographical map filed as plaintiff's exhibit "A", and the diagram accompanying Fred A. Mensch's report, enclosure No. 49 to the report of the Secretary of the Interior dated November 2, 1933, which diagram is reproduced and filed as an appendix to this opinion.)

Beginning on the north, these creeks are Wapinitia Creek, Nena Creek, an unnamed creek, Eagle Creek, and the Antoken Creek on the south. The headwaters of both Eagle

Creek and Nena Creek are considerably south of any possible starting point, so that if the divide between any two of the creeks is strictly followed until it intersects with the main divide between the White River system and the Warm Springs River system, the northern boundary would dip far to the south on its westward course. On the other hand, if the spur to the north is followed, the line would shoot far to the north of an east-west course. The chief difficulty lies in running the line from the point where the main divide discontinues its east-west course to the point on the De Chutes River.

But, before settling this question, let us determine the starting point on the De Chutes River. This is described as a point in the De Chutes River opposite the eastern termination of the Mutton Mountains. Handley fixed this as a point on the river between the mouths of Antoken Creek and Eagle Creek; McQuinn fixed it several miles north, at a point on the De Chutes River between the mouths of Wapinitia and Nena Creeks. We are of opinion that the point fixed by Handley is substantially correct. McQuinn in fact originally fixed his starting point twenty chains south of Handley's point, instead of six miles north thereof. He changed it only because the Indians were greatly dissatisfied with it and threatened to destroy all corners that he might establish, if it were adhered to. To meet this situation the Indian Agent was instructed by the Indian Office to undertake to arrive at an understanding with the Indians. They insisted that the beginning point was farther north between the mouths of Wapinitia and Nena Creeks, and this was agreed to and adopted by McQuinn, but only in order to satisfy them, and not because he thought it was where the treaty designated the beginning point to be.

The report of the Warm Springs Commission states:

> The initial point of the McQuinn line is located in the De Chutes River opposite a range of low lands or hills called "Neena Hills," some 10 or 12 miles north of and down the De Chutes River from the eastern termination of Mutton Mountains. This line does not touch the range of highlands known as Mutton Mountains at any point, and runs without reference to summit or divide, sometimes along and sometimes across a range of low-lands or hills.

Since his starting point was not opposite "the eastern termination" of the Mutton Mountains, it must be rejected. The testimony shows that the Mutton Mountains run in a northeasterly and southwesterly direction, and not east and west. The northeasterly termination of this range of mountains, according to the topographical map filed as plaintiff's exhibit "A", is in the neighborhood of the point established by Handley, and in the neighborhood of the point originally established by McQuinn before he encountered the opposition of the Indians. These mountains do not extend to the point finally adopted by McQuinn. Handley's starting point is the northernmost point of these mountains immediately on the De Chutes River, and it is as far east as any other point in the range.

Everyone who has surveyed this northern boundary or investigated the surveys thereof agrees that this is approximately the proper beginning point according to the terms of the treaty, with the sole exception of Mensch. He thinks McQuinn's starting point, as finally adopted, is correct, but, as we have stated, McQuinn adopted this point not because he thought it was the beginning point as defined by the treaty, but only to satisfy the Indians. The Indians claimed that this was the proper beginning point because it was the point pointed out to them by Indian Agent Thompson, but we do not regard this as material, since this was done two years after the treaty was signed. Mensch undertakes to justify it by showing that from this point a divide can be followed to the Cascade Mountains; but this is not conclusive because a divide can be followed to these mountans from other places opposite the Mutton Mountains on the De Chutes River. The fact that a divide can be followed from McQuinn's starting point to the Cascade Mountains is nullified by the fact that it is not opposite "the eastern termination" of the Mutton Mountains. Nor do the hills opposite this point extend to the De Chutes River. The Mutton Mountains to the south extend considerably to the east of the eastern termination of these hills.

After careful consideration of all the testimony we are of opinion that the starting point fixed by Handley is substantially correct.

From this point the treaty provides that the line runs to the summit of the Mutton Mountains; and thence "along the divide to its connection with the Cascade Mountains." As heretofore stated, if the divide or watershed is strictly followed, the northern boundary twice would dip far to the south, since the headwaters of Eagle Creek and Nena Creek are far to the south of the starting point. We are convinced that this was not intended by the parties. We are of opinion that the parties intended that the northern boundary should run in a fairly straight line in a general east and west direction. There is attached to the report of the Secretary of the Interior in this case, dated November 2, 1933, enclosure No. 49, a sketch of the Warm Springs Reservation used by General Palmer when he negotiated the treaty with the Indians, which sketch is filed herein as appendix No. 1 to this opinion. This sketch shows a range of mountains on the north of the reservation, which runs in an almost due east and west direction from the De Chutes River to the Cascade Mountains. We think the parties relied upon this sketch as showing the approximate course of the northern boundary. Palmer himself was but slightly familiar with the country. The Indians were somewhat more familiar with it. They no doubt were familiar with the general course of the divide between the Warm Springs River system and the White River system, because this divide is fairly well defined, but it is extremely doubtful that any of them knew that the east-west divide discontinued on the eastern part of the reservation. In the west it runs from the Cascade Mountains in a direction slightly south of east, in a fairly straight line.

We feel sure the parties contemplated that the northern boundary would run in a fairly straight line in a general east and west direction. It is not reasonable to suppose that any of them thought that it would dip far to the south or north as it approached the eastern boundary. Their idea of its course must have been substantially that shown on General Palmer's sketch. The divide from the Cascade Mountains on the west to the point where it discontinues its easterly course and breaks up into spurs, being known and being substantially in accord with General Palmer's sketch, we think was in the minds of the parties when the treaty was signed.

But we have no reason to think that any of the parties knew that this divide broke off into widely divergent spurs as it approached the eastern boundary. They believed, we think, that it continued on in its general easterly course to the De Chutes River, as was indicated on General Palmer's sketch.

We are of the opinion, therefore, that when the point is reached where the divide ceases its east and west course and breaks up into spurs, the divide should be abandoned and a straight line run from this point to the initial point on the De Chutes River. This is the course the White River-Warm Springs River divide would have taken had it continued its course to the De Chutes River. This line approximately bisects the area bounded by Wapinitia Creek on the north and the Antoken Creek on the south, with their corresponding ridges. It is substantially, we think, what was in the minds of the parties when the treaty was signed.

No survey has exactly followed the divide between the White River and Warm Springs River systems from the Cascade Mountains to the end of its east-west course, but McQuinn's survey substantially does so. From his 7½-mile corner, where the blazed tree pointed out by Indian Agent Thompson is supposed to have stood, his line runs in a straight line to his 30-mile post, which is on the summit of the Cascade Mountains at Little Dark Butte. By reference to Mensch's "Diagram accompanying the Investigation Report of the north and west boundaries of the Warm Springs Indian Reservation, Oregon," filed as an appendix hereto, it will be observed that McQuinn's line runs slightly north of the divide from his ten-mile post to his twenty-mile post, and from this point to between his 23rd and 24th mile post it runs to the south, and from this point on, to the north of the divide. He has erred both on the one side and the other. It, however, substantially conforms to the terms of the treaty, and we are of opinion that considerations of justice and equity, as well as of putting an end to uncertainity and further litigation, dictate that we adopt his line as the true northern boundary from his thirty-mile post at Little Dark Butte to his 7½-mile post. From this point to the initial point as established by Handley we think the northern boundary should run in a straight line.

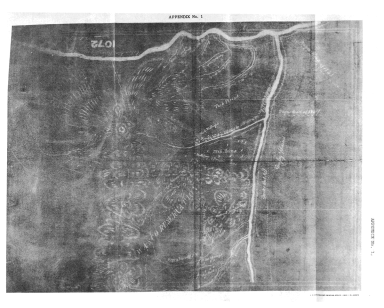
4. There remains the question of the western boundary. The western boundary is described in the treaty as running from the northwestern corner of the reservation "southerly to Mt. Jefferson." It is open to question whether or not the treaty intended that it should run in a direct line from the northwestern corner to Mt. Jefferson, or should run in a southerly direction to Mt. Jefferson along the summit of the Cascade Mountains. Although the summit of the Cascade Mountains is not mentioned, there is some warrant for saying the line should run along it, because of this: The Indians ceded to the United States a large tract of land, the western boundary of which is described as follows:

> Commencing in the middle of the Columbia River, at the Cascade Falls, and running thence southerly to the summit of the Cascade Mountains; thence along said summit to the forty-fourth parallel of north latitude.

From this tract there was reserved the reservation the boundaries of which are in dispute. Since the western boundary of the land ceded the United States was the summit of the Cascade Mountains, it would appear reasonable to suppose that the parties understood the western boundary of the Indian reservation to be the summit of the Cascade Mountains.

However, both Campbell and McQuinn have run the western boundary on a straight line from their respective northwest corners to Mt. Jefferson. Campbell's line runs most of the way to the east of the summit of the Cascade Mountains. McQuinn's western boundary would include within the reservation considerable territory to the west of the Cascade Mountains toward the northern part of the reservation, and immediately to the south would exclude approximately an equivalent amount of territory east of the summit of these mountains, and thereafter would run sometimes slightly to one side and sometimes slightly to the other side of the summit of these mountains. (See diagram accompanying Mensch's report heretofore referred to.)

Although there is doubt that McQuinn's western boundary is in exact accord with the intention of the parties when the treaty was signed, we think it does substantial





justice, and for this reason and to avoid another survey of these boundaries we adopt McQuinn's western boundary line as the true western boundary of the reservation.

We therefore conclude that the defendant has appropriated to its own use all of the lands to the north of the Handley-Campbell line, and south of the true north boundary as herein defined, and the plaintiffs are entitled to recover the value thereof. The defendant has also appropriated to its own use all of the lands between the Campbell line on the west and the true western boundary as herein defined, and the plaintiff is entitled to recover the reasonable value thereof.

The plaintiffs are not entitled to recover for any rights secured to them in the territory outside of the reservation as herein defined.

5. Under the treaty of 1855 the defendant agreed to expend for the benefit of the Indians the sum of $150,000 and to erect certain buildings and to furnish certain equipment, and to furnish and pay certain employees. The plaintiff alleges that these obligations have not been discharged, but its proof is insufficient to support the allegations. The report of the General Accounting Office shows that far more has been spent than is called for by the treaty. Even though the defendant may not have erected the precise buildings called for, the offsets to which the defendant would be entitled far exceed the value of these buildings.

The plaintiff is not entitled to recover on these claims.

We conclude as a matter of law: (1) that the northern boundary runs from McQuinn's 30-mile post at Little Dark Butte along the line established by him to his 7½-mile post, and thence in a straight line to the starting point on the De Chutes River established by Handley; (2) that the western boundary is the western boundary established by McQuinn; (3) that the plaintiff is entitled to recover the value of the lands between these boundaries and the northern and western boundaries established by Handley and Campbell; and (4) the plaintiff is not entitled to recover on its other claims. It is so ordered.

MADDEN, *Judge*; JONES, *Judge*; LITTLETON, *Judge*; and WHALEY, *Chief Justice*, concur.

ENGINEERS' CLUB OF PHILADELPHIA v. THE UNITED STATES

[No. 44568. Decided February 2, 1942]

On the Proofs

Excise tax; dues and initiation fees of members of social club; res judicata.—Where under a decision of a District Court of the United States it was held that the plaintiff club was not a social club and hence that the dues and initiation fees of its members were not taxable under Section 501, Revenue Act of 1926, as amended; it is *held* that the question whether or not the plaintiff was a social club, during the period in question in the instant suit, was not *res judicata* by reason of said District Court decision.

Same; lack of identity of parties.—A judgment in a suit against a collector of internal revenue for refund of taxes paid is not *res judicata* in a later suit against the Commissioner of Internal Revenue or the United States, because of a lack of identity of parties. *Bankers Pocohantas Coal Co.* v. *Burnet, Commissioner*, 287 U. S. 308, cited.

Same; different set of facts.—Where the parties to a suit in a District Court of the United States and the parties in the instant suit are identical but where the facts are not identical, involving different though similar sets of events; it is *held* that the judgment of the said District Court is not *res judicata*. *Tait* v. *Western Maryland Ry. Co.*, 289 U. S. 620, distinguished.

Same.—Where plaintiff's activities in the period in question in the instant case were not those of an earlier period, previously litigated, though comparable and similar, the court may not close its eyes and minds to the facts actually before the court and give to plaintiff a judgment which the court would not give to any other plaintiff whose cause of action had equal merit.

Same.—The doctrine of *res judicata* should not be so extended.

Same.—Where it is found, upon the evidence, that plaintiff's operations for the period in question in the instant suit, July 1935 to January 1938, were for tax purposes those of a social club, it is *held* that the excise taxes on the dues and initiation fees of plaintiff's members were properly collected, under Section 501 of the Revenue Act of 1926 as amended (U. S. Code, Title 26, Sections 950, 951, 952), and plaintiff is not entitled to recover.

The Reporter's statement of the case:

Mr. John E. Hughes for the plaintiff. *Mr. William Cogger* was on the briefs.

Mr. Fred K. Dyar, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for defendant. *Mr. Robert N. Anderson* was on the brief.

The decision in this case was filed on November 3, 1941, with special findings of fact and opinion by Judge Madden and concurring opinion by Judge Whitaker; the petition being dismissed.

On the plaintiff's motion for new trial the court, on February 2, 1942, entered an order allowing said motion; the findings of fact filed on November 3, 1941, were vacated and withdrawn, and amended findings were filed in lieu thereof; the former judgment and opinions to stand.

On February 2, 1942, the court made amended special findings of fact as follows:

1. Plaintiff, a corporation organized under the laws of Pennsylvania and located at 1317 Spruce Street, Philadelphia, Pennsylvania, was incorporated in 1892 for the following purposes:

> * * * to promote the Arts and Sciences connected with Engineering, by means of periodical meetings for the reading and discussion of professional papers, and the circulation by publication among its members and others of the information thus obtained, and for social intercourse.

2. Article I of its bylaws relating to membership provides:

> SECTION 1. Professional engineers, or persons who, by scientific, technical, or practical experience are qualified to cooperate in the advancement of engineering, may be elected to membership in the Club.
>
> SEC. 2. There shall be four classes of members, viz: Honorary, Active, Army and Navy, and Junior.
>
> SEC. 3. An Honorary Member shall be a person of broadly acknowledged eminence in the field of the activities of the Club.
>
> SEC. 4. An Active Member shall be not less than twenty-five years of age.

SEC. 5. A Junior Member, when elected, shall be at least eighteen years and less than thirty-three years of age. * * *

SEC. 6. An Army and Navy Member shall be a commissioned officer in active or reserve service in the United States Army, Navy, or Marine Corps.

SEC. 7. All classes of members shall enjoy equal privileges except that only Honorary and Active Members shall be eligible to vote or hold office.

As of January 1937 the membership was as follows:

Active resident	462
Active nonresident	134
Resident Juniors	193
Nonresident Juniors	27
Resident Army and Navy	17
Nonresident Army and Navy	51
Honorary	4

Cards were issued on request of a member to the women of his immediate household, which gave the holders the privileges of the ladies' reception room and dining room, which rooms were for the sole use of such ladies or members accompanied by ladies. Other parts of the club premises were barred to ladies, except on occasions arranged for by the House Committee. Approximately 199 ladies held cards. Ladies holding cards could bring other ladies as guests.

Under the bylaws of the club an organization, 25 percent of whose members were members of plaintiff club and whose objects and activities enabled them to cooperate with the club, in the opinion of the Board of Directors, might be elected an affiliated organization. Ten such organizations had been elected as affiliates. They were all technical organizations, such as the American Institute of Electrical Engineers, the American Society of Civil Engineers, and the American Society of Mechanical Engineers. Most of them held monthly meetings at plaintiff's clubhouse, ordinarily after dinner, and sometimes committee meetings of plaintiff's affiliates were held in the clubhouse during the daytime. Other technical organizations which were not affiliates of the plaintiff held their meetings in plaintiff's clubhouse. Among such organizations were the American Foundrymen's Association, the Institute of Radio Engineers, and the Society of Professional Engineers.

Plaintiff maintained an engineer center in Philadelphia, where all engineers were welcome and where they could hold their meetings after proper arrangements therefor had been made with the plaintiff.

3. About once a month for seven or eight months during the year plaintiff, either alone or in conjunction with one of its affiliated organizations or some other technical society, gave "get together" dinners, at which there might be speaking or other form of entertainment, followed by a general social gathering, sometimes including dancing. About once a year some or all of the affiliated organizations held a similar meeting at the club.

Luncheon and dinner were served daily. The luncheons were largely attended, the attendance averaging from 100 to 125 persons. The attendance at dinner was small, except on special occasions.

The club had a glee club of about 30 members, and an orchestra of about 10 members. There were 4 pianos in the clubhouse.

4. Monthly, except during the summer months, plaintiff issued a publication called "The Announcer," giving the principal activities for the coming month. For a typical year as shown by The Announcer there were 177 meetings in the club, 13 of which were social in the sense they were not devoted to educational, technical, or business purposes, and 164 of which were technical in character.

Plaintiff formerly published a monthly technical magazine called "Engineers and Engineering," but this was discontinued during the depression and has not been revived.

5. Plaintiff owned the premises at 1317 Spruce Street, which was carried on its books at a value of $211,500, and it also owned furniture and fixtures which had a book value of $40,800. The building is a four-story brick, with a frontage of 50 feet and a depth of 163 feet, on which there is an outstanding mortgage of $125,000, the mortgage bonds being held by members of the club.

On the first floor there were a main lounge, the main dining room, a writing room, a ladies' reception room, and a ladies' dining room. On the second floor were the auditorium with a raised platform, a library with shelves for

3,500 technical books and space for technical magazines, the Green Room, the Gold Room, the Secretary's office, and the Board of Directors' Room. On the third floor were a room used for storage and also for mimeographing work, a room used by the technical service committee, and a room for the Junior Section. The rest of the third floor was taken up with seven sleeping rooms. The fourth floor, west side, was taken up with nine sleeping rooms, and on the east side by a classroom. In the basement were washrooms, a pool table, a billiard table, and four card tables, and a bar. The rooms were comfortably and attractively furnished. Most of the bedrooms were rented to the members by the month, but there were usually four or five rooms available for overnight guests.

Available in the lounge were four local newspapers, two New York newspapers, and ten popular magazines. A cigar stand was maintained in the lobby.

6. The staff of the club consisted of a secretary and three assistants, an accountant and one assistant, a librarian, three desk men, a doorman, two porters, a maintenance man or engineer, a steward, a chef and assistant chef, a pantryman, two dishwashers, a head waitress and five waitresses, and one bartender. Extra help was engaged as needed in the winter. An average of 30 people were employed.

7. The average yearly income of the club for the period from July 1935 to January 1938 was $89,575. Out of each $100 of income, the restaurant yielded $35.14, the bar, $11.48, billiards and pool, $0.11. The support of the club came primarily from membership dues.

8. Plaintiff paid the dues tax until 1921 when the then Commissioner of Internal Revenue ruled that it was not a social club and not taxable as such and the tax that it had paid was refunded. In 1932 the then Commissioner of Internal Revenue ruled it taxable as a social club.

9. During the period from July 1935 to January 1938, both inclusive, plaintiff paid to the defendant as taxes on dues and initiation fees of its members a total of $6,261.43, made up of the following payments:

Period	Tax	Date paid	Period	Tax	Date paid
1935			1937		
July	$141.74	Sept. 4, 1935	January	$124.94	Mar. 3, 1937
August	81.03	Oct. 2, 1935	February	48.45	Apr. 2, 1937
September	246.59	Nov. 4, 1935	March	910.56	May 4, 1937
October	145.32	Dec. 4, 1935	April	572.61	June 3, 1937
November	90.94	Jan. 3, 1936	May	179.56	July 3, 1937
December	100.29	Feb. 4, 1936	June	86.82	Aug. 5, 1937
			July	165.45	Sept. 3, 1937
1936			August	66.21	Oct. 5, 1937
January	126.26	Mar. 4, 1936	September	277.51	Nov. 4, 1937
February	47.32	Apr. 3, 1936	October	131.49	Dec. 4, 1937
March	680.61	May 4, 1936	November	74.76	Jan. 5, 1938
April	669.89	June 3, 1936	December	81.44	Feb. 5, 1938
May	120.59	July 1, 1936			
June	140.31	Aug. 4, 1936	1938		
July	170.79	Sept. 3, 1936	January	115.90	Mar. 3, 1938
August	76.31	Oct. 2, 1936			
September	269.86	Nov. 4, 1936			
October	140.41	Dec. 2, 1936			
November	86.20	Jan. 6, 1937			
December	91.27	Feb. 2, 1937			

A claim for the refund thereof was filed by plaintiff on March 17, 1938, based on the following:

> Opinion of District Court, Eastern District of Pennsylvania, filed September 3, 1937, copy attached, holding this club not subject to tax under Section 501, Revenue Act of 1926, as amended.

Before acting upon the claim the Commissioner demanded the submission of powers of attorney by the members of the club, authorizing the club to act as their agent in the collection of the taxes. Plaintiff took the position that the regulation requiring the submission of such affidavits was invalid under the decision of this court in *Builders Club of Chicago* v. *United States*, 83 C. Cls. 556, 14 F. Supp. 1020, but upon continued demand therefor requested an extension of time within which to secure such powers of attorney. The Commissioner refused this extension. On December 27, 1938, the Commissioner rejected the claim on the ground that such powers of attorney had not been furnished. On the same day suit for the recovery of such taxes was filed in this court.

On March 29, 1939, the Commissioner wrote plaintiff a further letter rejecting the claim, which letter concluded as follows:

> The directory issued by the Club, March 1, 1937, sets forth that the following are the advantages of membership:
>
> Headquarters for Technical and Engineering Activities in Philadelphia.
>
> Industrial and civic problems involving technical and engineering questions are considered and discussed.
>
> A spacious lounge, current periodicals, comfortable library, well managed restaurant, excellent cooking, very reasonable prices, are worth-while attractions.
>
> Thirty-day cards extend every privilege to out-of-town friends.
>
> Convenient central city club home to meet and entertain friends and acquaintances.
>
> Ladies enjoy separate lounge room and restaurant.
>
> Private dining rooms available for special parties.
>
> Ladies, families and friends participate in frequent evening events which are pleasurable and interesting.
>
> Membership card carries House and Library privilege in many Engineers clubs and organizations throughout the United States.
>
> Rooms available for members and their transient guests.
>
> Ask your friends, associates and co-workers to become members that they may enjoy the benefits.
>
> * * * * *
>
> For what you pay in tips at other restaurants you can maintain a membership in the club.
>
> Low dues—Low prices—"no tips."
>
> In view of the fact that one of the purposes of the club is social intercourse and in view of the social features and advantages offered to members, as set forth above, it is held that, for the period involved in the claim, the club qualified as a social club or organization within the meaning of section 501 of the Revenue Act of 1926, as amended by section 413 of the Revenue Act of 1928, and that amounts paid as dues and initiation fees in the club were subject to the tax

> imposed by that section of the Act. Furthermore, the claim of the club for refund of the tax collected from its members and paid over to the Government may not be allowed in any event unless the requirements of article 54 of Regulations 43 that powers of attorney showing the authority of the club to claim a refund on behalf of the members who paid the tax be submitted to the Commissioner in support of the claim are complied with.

Plaintiff's directory issued March 1, 1937, contained the language quoted by the Commissioner in the foregoing letter.

10. On May 14, 1936, two suits were filed by plaintiff in the United States District Court for the Eastern District of Pennsylvania, one against W. J. Rothensies, Collector of Internal Revenue, and the other against the defendant, United States of America. The suit against the Collector sought a refund of taxes on initiation fees and dues paid by plaintiff for the months of March to June 1935, and the suit against the United States sought a refund of taxes on initiation fees and dues paid by plaintiff for the months of January 1932 to February 1935, both inclusive. Both suits were filed on the ground that plaintiff was not a social club.

Both defendants defended upon the sole ground that plaintiff was a social club. Judgment was entered for plaintiff in each suit for the amount of taxes collected and interest, pursuant to an unreported opinion filed by United States District Judge Kirkpatrick. In the opinion the sole question discussed was whether or not plaintiff was a social club. On this issue the court found:

> 1. The predominant purpose of the Organization is not a social one. As expressed by its charter, the predominant purpose is to promote the arts and sciences connected with engineering.
>
> 2. The Club has social features which, as well as I can estimate it, constitute some ten or twelve percent of the sum of the activities, interests, and club life of its members.
>
> 3. The social features of the Club are subordinate and merely incidental to the active furtherance of the predominant purpose.
>
> 4. The social features of the Club are not a material purpose of the organization.

Certain conclusions of law have to do directly with the foregoing findings, and I will state them specially.

1. The fact that the Club charter, after stating what I have found to be the predominant purpose of the Organization, adds, "and for social intercourse," does not compel a finding that the social intercourse feature was a material purpose.

These words may have been, and no doubt were, included in order to make the Organization a "club" and to regularize the carrying on of the small amount of subordinate and incidental social activities.

2. My finding as to the percentage of social activities of the Club would indicate that they form a material *part of its activities. I cannot, however, agree with* the defendant that the question is whether or not a material part of the Club *activities* are of a social nature. If that were so, there would be very few clubs which would escape taxation, and most of the reported cases would have been differently decided. The question is whether the social features are a material *purpose* of the Club. They may be a material part of its activities and still be subordinate and merely incidental to the main purpose. That, I think, is the situation here.

Appeals from said judgments were perfected and transcript of record filed. Subsequently, a settlement was effected whereby plaintiff accepted the principal amounts of the judgments and waived interest. As a result of the settlement, the appeals were dismissed. The principal amount of the judgments totalling $11,672.90 was paid, and interest in the total amount of $3,330.88 was waived by plaintiff.

11. During the period involved in the suits before the District Court and the period involved in this suit plaintiff's charter and its purposes and activities were of substantially the same nature and extent.

12. Social activities constituted a material purpose of plaintiff club, and an important and substantial part of its activities during the period here in question.

The court decided that the plaintiff was not entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

Plaintiff sues to recover taxes paid by it which were levied by the defendant upon it pursuant to Section 501 of the

Revenue Act of 1926 as amended by Section 413 (a) of the Revenue Act of 1928.

The section is as follows:

> SEC. 413. CLUB DUES TAX.
>
> (a) Section 501 of the Revenue Act of 1926 is amended to read as follows:
>
> "SEC. 501. (a) There shall be levied, assessed, collected, and paid a tax equivalent to 10 per centum of any amount paid—
>
> "(1) As dues or membership fees to any social, athletic, or sporting club or organization, if the dues or fees of an active resident annual member are in excess of *$25 per year; or*
>
> "(2) As initiation fees to such a club or organization, if such fees amount to more than $10, or if the dues or membership fees, not including initiation fees, of an active resident annual member are in excess of $25 per year.
>
> "(b) Such taxes shall be paid by the person paying such dues or fees.
>
> * * * (U. S. C., Title 26, Secs. 950, 951, 952.)

Article 36 of Regulations 43, first promulgated in 1917, and in effect since that time, is as follows:

> ART. 36. SOCIAL CLUBS.—Any organization which maintains quarters or arranges periodical dinners or meetings, for the purpose of affording its members an opportunity of congregating for social intercourse, is a "social * * * club or organization" within the meaning of the Act, unless its social features are not a material purpose of the organization but are subordinate and merely incidental to the active furtherance of a different and predominant purpose, such as, for example, religion, the arts, or business. The tax does not attach to dues or fees of a religious organization, chamber of commerce, commercial club, trade organization, or the like, merely because it has incidental social features, but, if the social features are a material purpose of the organization, then it is a "social * * * club or organization, within the meaning of the Act. An organization that has for its exclusive or predominant purpose religion or philanthropic social service (or the advancement of the business or commercial interests of a city or community) is clearly not a "social * * * club or organization." Most fraternal organizations are in effect social clubs, but if they are operating under the

lodge system, or are local fraternal organizations among the students of a college or university, payments to them are expressly exempt.

* * * * *

The period for which the taxes in question were paid was July 1935 to January 1938. Plaintiff filed a timely claim for refund of the taxes, asserting as the basis for its claim an opinion of the United States District Court for the Eastern District of Pennsylvania. That opinion was rendered in connection with two decisions of the District Court in favor of plaintiff, one against the defendant, covering the period January 1932 to February 1935, the other against one Rothensies, Collector of Internal Revenue, covering the period March to June 1935. In each case the Court held that the taxes paid by plaintiff under the section of the statute here involved could be recovered by plaintiff because it was not, during those periods, a social club for tax purposes. Plaintiff's claim for refund of the taxes here involved was denied by the Commissioner and plaintiff brought this suit.

Our first question is whether we are free to determine whether or not plaintiff was a social club during the period 1935 to 1938 here in question. Plaintiff says we are not; that the question of social club *vel non* is *res judicata* by reason of the District Court decisions.

In our opinion plaintiff's operations for the period July 1935 to January 1938, were, for tax purposes, those of a social club. Laying aside the question of *res judicata*, it would follow from that opinion that the taxes were properly collected, and may not be recovered. That opinion is in accord with many decisions of this court.[1] It is urged upon us, however, that regardless of that opinion we are bound to conclude, what we do not believe to be true, that plaintiff's activities were not those of a social club because the District Court decided in other cases, one of which was between the same parties and the other between plaintiff and a collector of Internal Revenue, that plaintiff's activities from January 1932 to February 1935 were not those of a social club.

[1] See cases cited *infra*, note 7.

Plaintiff's activities in the later period, here in question, were not those of the earlier period, previously litigated. They were comparable and similar. We have found that they were substantially the same in nature and extent. But they were a completely different set of events, and they were not the set of events litigated in the earlier cases. We are asked, then, to close our eyes and minds to the facts actually before us, and to give to plaintiff a judgment which we would not give to any other plaintiff whose cause of action had equal merit. We are asked thus to discriminate with regard to a public and recurring duty, the duty to pay taxes, thus setting plaintiff apart from all other taxpayers who resort to this court with similar cases.

The doctrine of *res judicata* should not be so extended. Any application of the doctrine in tax cases to relieve a taxpayer of, or to subject him to the payment of, a tax in a later year because of litigation with reference to an earlier year, has been criticized.[2] A learned commentator has pointed out that the invocation of the doctrine in tax cases has promoted litigation instead of producing peace, as the doctrine is supposed to do.[3] The instant case is an example. In addition to trying the facts of plaintiff's operations for the three years here in question, it has been necessary to try again the facts which were tried before the District Court covering another period of years, in order to determine whether they were so substantially similar that the doctrine of *res judicata* would have to be considered. The learned authority cited above suggests the following approach to the question:

> Where different taxable years are involved in the two cases, res judicata should be applied much more narrowly than has been true in some cases in the past. Not only should it be confined to issues which are identical in the two cases, but the word "identical" should be rigidly construed to apply only to situations where the applicable statute is unchanged and all of the controlling events occurred before the earlier of the tax years.[4]

[2] Report of Committee on Federal Taxation of the American Bar Association, 61 A. B. A. Rep. 821 (1936).

[3] Griswold, Res Judicata in Tax Cases, 46 Yale L. J. 1320 (1937).

[4] Griswold, *op. cit.* at p. 1357.

This suggestion seems to us to be wise.

As to the suit in the District Court against the Collector, for the period March to June 1935, immediately preceding the period covered by the present suit, the conclusion of the Supreme Court in *Bankers Pocohantas Coal Co.* v. *Burnet, Commissioner*, 287 U. S. 308, is that a judgment in a suit against a collector is not *res judicata* in a later suit against the Commissioner or the United States, because of a lack of identity of parties.

In the other case in the District Court, the parties were identical with the present parties. But the facts were, as we have said, not identical. They were a different, though similar, set of events. They consisted of a whole course of conduct from day to day in all its details of an enterprise of considerable scope. They were the kind of events which, though similar, might easily vary from period to period enough to change the judgment of the same tribunal though it held the same view of the meaning of the applicable statute.

The decided cases do not apply the *res judicata* principle to such situations. In the case of *Tait* v. *Western Maryland Ry. Co.*, 289 U. S. 620, the events were as follows: Two predecessors of the railway company had, before 1908 and in 1911, issued and sold at a discount their mortgage bonds. In 1917 the newly formed railway company recognized these outstanding bonds as its obligation. It claimed the right to a deduction from its gross income for income tax purposes for 1918 and 1919 of an amortized proportion of the discount. The Commissioner of Internal Revenue disapproved the deduction, but on litigation through the Board of Tax Appeals and the Circuit Court of Appeals, the Company's position was sustained. The Company later claimed and sued for refunds for the tax years 1920–1925, the statute, regulations and question at issue being the same. The Supreme Court held that the principle of *res judicata* was applicable. In that case the events sought to be tried in the second suit were the identical historical events which had been tried in the first. The application of the doctrine of *res judicata* in such a case is not a precedent for its application here. Other Supreme Court cases have not shown any tendency to

extend the scope of the principle in tax cases.[5] Nor have the other Federal Courts applied the principle in cases fairly comparable to this case.[6]

We conclude, therefore, that we are free to determine whether plaintiff's activities for the year in question were those of a social club. As already indicated in this opinion, we think they were. The findings of fact show that the social features of the club were not merely incidental, but were a material purpose of the club and an important and substantial part of its activities. This court has frequently held that such clubs are taxable.[7]

In view of our conclusions as to the non-applicability of *res judicata*, and as to plaintiff being a social club, it is not necessary for us to re-examine the question of whether the regulation requiring plaintiff to file powers of attorney from its members in connection with the claim for refund was valid. We therefore state no conclusion upon that question.

Plaintiff's petition will be dismissed. It is so ordered.

JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, concurring:

I concur in the result reached, but for different reasons.

I think the decision of the District Court for the Eastern District of Pennsylvania, holding that this taxpayer was not a social club, is *res judicata* in this proceeding and precludes us from inquiring whether or not it was in fact a social club. I think we are required to so hold by the decision of the Supreme Court in *Tait* v. *Western Maryland*

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[5] *United States* v. *Stone & Downer Co.*, 274 U. S. 225; *Bankers Pocohantas Coal Co.* v. *Burnet, Commissioner*, 287 U. S. 308.

[6] See 130 A. L. R. 374 for a collection of the authorities. The District Court for the Western District of Pennsylvania has recently declined to apply the doctrine to a case like the present one. *Duquesne Club* v. *Bell*, 1941, C. C. H., par. 9368.

[7] *Fisler* v. *United States*, 66 C. Cls. 220; *Army and Navy Club* v. *United States*, 72 C. Cls. 684; *Wichita Commercial and Social Club Ass.* v. *United States*, 77 C. Cls. 80; *Union League Club* v. *United States*, 78 C. Cls. 351; *Chicago Engineers Club* v. *United States*, 80 C. Cls. 615, 621; *The Lambs* v. *United States*, 81 C. Cls. 216; *Century Club* v. *United States*, 81 C. Cls. 878; *Duquesne Club* v. *United States*, 87 C. Cls. 483.

Railway Co., 289 U. S. 620, 623. The testimony in this case is uncontradicted that the purposes and activities of the club in the year now before us were the same as in the year before the District Court. This being true, the judgment in the former proceeding, that the plaintiff was not a social club, is conclusive here. *Tait* v. *Western Maryland Railway Co.*, *supra*, so holds.

But the defendant in this proceeding interposes a defense not raised in the case in the District Court, and this it may do under the authority cited *supra*. See also *Twin Cities Properties, Inc.*, v. *United States*, 90 C. Cls. 119; *Harvey Coal Corp.* v. *United States*, 92 C. Cls. 186, 35 F. Supp. 756. That defense is that the plaintiff is not entitled to maintain this suit because of its failure to comply with article 54 of Treasury Regulation 43 (revised), which requires a club seeking a refund of taxes paid on initiation fees and dues to file powers of attorney executed by the members on whose behalf the refund is sought. This question was not considered by the District Court for the Eastern District of Pennsylvania.

The right of a club to maintain an action for the refund of taxes paid on initiation fees and dues has been before this court twice before. In *Alliance Country Club* v. *The United States*, 62 C. Cls. 579, we held that a club was entitled to maintain a suit to recover taxes paid on initiation fees and dues imposed upon its members. In that proceeding the court had under consideration section 801 of the act of November 23, 1921 (42 Stat. 227, 291), but the provisions of that act are the same as the act here under consideration (sec. 501 of the Revenue Act of 1926, 44 Stat. 9, as amended by sec. 413 of the Revenue Act of 1928, 45 Stat. 791, 864), insofar as is material here. Both that act and the act before us provide that the taxes are to "be paid by the person paying such dues or fees." After having quoted the provision of a regulation issued by the Commissioner of Internal Revenue on March 28, 1919, providing that as a condition precedent to the right to claim a refund the club must furnish a sworn statement that no claim for refund had been filed by its members, this court said:

> So it seems that the Treasury Department recognizes and treats the club as the taxpayer, both as the proper party to pay the tax and also as entitled to recover the tax if the same has been illegally or erroneously paid. We are of the same opinion, and therefore think there is nothing in the contention of the Government that the plaintiff is not the proper party to bring this action.

Later, the regulation quoted in that case was changed, and there was adopted instead the regulation now in force requiring the filing of powers of attorney by the members of the club. After this change, there came before us the case of *Builders' Club of Chicago* v. *United States*, *supra*, in which the Commissioner of Internal Revenue refused to refund to the club the taxes alleged to have been erroneously collected for the same reason now advanced in this case, to wit, that the club had failed to file powers of attorney executed by its members authorizing the club to act as their agent. This question was carefully considered by the court, and we held that the club was entitled to maintain an action for the refund of the taxes, notwithstanding the fact that it had not filed such powers of attorney. We said that the requirement that such powers of attorney be filed was "legislation in the guise of a regulation and therefore invalid."

When demand was made upon the plaintiff in this case by the Commissioner of Internal Revenue for the furnishing of powers of attorney, the plaintiff insisted that it was not required to do so, expressly stating that it relied upon our decision in *Builders' Club of Chicago* v. *United States*, *supra*. The defendant replied that the regulation was nevertheless still in force and insisted upon compliance with it. A month later plaintiff's attention was called to the fact that the powers of attorney had not been received and it was notified that they must be sent in within thirty days. Before the expiration of this time plaintiff wrote defendant stating it would be impossible to secure powers of attorney from all of its 1,000 members within that time, and requested an extension until January 3, 1939, a period of about two months, within which to do so. This request was refused and plaintiff was requested to send on such powers

as were then on hand. Apparently this was not done, and a month and a half later the claim was rejected for this omission.

Was the *Builders Club* case correctly decided? The Act under consideration there and here expressly provided that the taxes were "to be paid by the person paying such dues or fees." The Club was required to collect the tax from its members and remit it to the defendant, but the member was the taxpayer, that is, the person on whom the tax was levied, and not the club. Therefore, any refund of a tax paid by a member is a refund due the member and not the club. The club has no right to it. If it secures the refund, it must pass it on to its members, unless they consent otherwise.

If this be correct, then it follows that the regulation of the Treasury Department requiring as a condition precedent the filing by the club of powers of attorney from its members authorizing it to act for them is a valid regulation.

The *Builders Club* case followed the *Alliance Country Club* case, decided ten years earlier, in which it was held that the club was the taxpayer, the ground of the decision in the *Builders Club* case. The decisions found support in the provision that the club was made liable for the tax whether it discharged its duty of collecting it or not; but I think there can be no doubt that it is on the member, and not on the club, that the tax is levied and, therefore, that it is the member, and not the club, who is the taxpayer, and who, therefore, is entitled to the refund.

This is consistent with what we said on the motion for a new trial in the case of *Bunker Hill Country Club* v. *United States*, 80 C. Cls. 375, 385, 10 F. Supp. 159. In that case suit was brought to recover taxes paid on initiation fees and dues collected by the Club from its members and remitted to the Government, on the theory that it was not a club, but a profit-making concern. In our opinion on motion for a new trial we said:

> On the contrary, the tax on the dues was paid to the corporation merely as an agent to remit the amount so paid to the Government. The findings show that the plaintiff "collected" the tax, entered it on its books

under a separate account as payable to the United States, and remitted the same to the collector. Whatever view we may take of the relation of the club members to the corporation, no tax on the dues was paid by the corporation out of its own funds, and no cause of action accrued to it against the Government.

This is also consistent with our decision in *Twentieth Century Sporting Club* v. *United States*, 92 C. Cls. 93, 34 F. Supp. 1021. The plaintiff in that case sought to recover taxes on admissions to boxing bouts. We denied recovery, saying—

> But even though the plaintiff had in fact borne the burden of the tax, it nevertheless was not the taxpayer; no taxes were exacted from it by the defendant and there is, therefore, no right given to it under the law to recover. * * * it was the purchaser of the ticket who paid the tax and, therefore, it is only he who has the right to maintain an action to recover.

This was in line with the decision of the Fifth Circuit Court of Appeals in *Regents of University System of Georgia* v. *Page*, 81 F. (2d), 577. In this case the plaintiff brought suit to recover admission taxes paid on admissions to football games held by it, on the theory that it was a governmental agent of the State of Georgia and, therefore, could not be assessed a tax by the Federal Government. This contention was rejected by the Fifth Circuit Court of Appeals on the ground that the purchaser of the ticket was the taxpayer and not the plaintiff. The court said on page 580:

> * * * While vigorously denying at all times that any admission tax is due, the appellant first paid it and sought to recover it through administrative channels. This effort failed because the tax payable on admission is an excise which is added to the price of admission and paid by the purchaser of the ticket. In the absence of a showing that the burden of the taxes was actually borne by it, appellant has no interest in the subject-matter of the controversy and cannot recover either by administrative claim for refund or action at law. *United States* v. *Jefferson Electric Mfg. Co.* 291 U. S. 386, 54 S. Ct. 443, 78 L. Ed. 859; *Shannopin Country Club* v. *Heiner* (D. C.) 2 F. (2d) 393; *Lafayette Worsted Co.* v. *Page* (D. C.) 6 F. (2d) 399,

400; *Bunker Hill Country Club* v. *United States* (Ct. Cls.) 9 F. Supp. 52; *Wourdack* v. *Becker* (C. C. A.) 55 F. (2d) 840, certiorari denied 286 U. S. 548, 52 S. Ct. 501, 76 L. Ed. 1285. The admission tax statute (44 Stat. 91, sec. 500, as amended) provides that the tax is "to be paid by the person paying for such admission." It further provides (44 Stat. 9, sec. 2) that "the term 'taxpayer' means any person subject to a tax imposed by this Act."

In *Shannopin Country Club* v. *Heiner*, 2 F. (2d) 393, the club brought suit to collect taxes paid on membership certificates. A demurrer was filed on the ground that the club was not the taxpayer. The court said:

> The revenue laws of the United States, under which this tax was assessed and collected by the plaintiff, impose this tax upon the members, and not upon the club itself. Section 801 of the Revenue Act of 1921 (42 U. S. Statutes, 291 [Comp. St. Ann. Supp. 1923, sec. 6309–5/8b]). Under this law, there is no primary money liability upon plaintiff to pay this tax. It had no burden, other than acting as collecting agent for the government in collecting the amount of taxes imposed by section 801 of the Revenue Act of 1921. This duty is made clear by section 802 of the Revenue Act of 1921 (42 U. S. Statutes 1921, p. 291 [Comp. St. Ann. Supp. 1923, sec. 6309–5/8c]), which clearly fixes the liability and responsibility of the plaintiff as far as the collection of these taxes is concerned. The plaintiff itself has paid no part of the taxes which it is now seeking to recover, and if it were permitted to recover judgment in this action, it would not in our opinion bar another action by the members themselves, who are the real parties in interest. If the taxes involved in the plaintiff's statement of claim were illegally assessed and collected from the members of the plaintiff corporation, they are the parties injured, and are the ones entitled to recover. There is nothing in the statement of claim which discloses that the plaintiff itself is a taxpayer and has paid any tax to the Government which it now seeks to recover.

No appeal was taken from this decision.

The Seventh Circuit Court of Appeals in *Wild Wing Lodge* v. *Blacklidge*, 59 F. (2d) 421, held the taxpayer to be the person paying initiation fees and dues, and not the club to which they were paid.

In the following cases various courts have recognized that the club member was the taxpayer, although in none of them was this question directly involved: *Munn* v. *Bowers*, 47 F. (2d) 204 (C. C. A. 2d); *Fleming* v. *Reinecke*, 52 F. (2d) 449 (C. C. A. 7th); *Foran* v. *McLaughlin*, 59 F. (2d) 158 (C. C. A. 9th); *MacLaughlin* v. *Williams*, 52 F. (2d) 724 (C. C. A. 3d).

The Treasury Department has consistently held that the club member, and not the club, was the taxpayer. As far back as 1920 it required a club seeking a refund to file a sworn statement that no claim for a refund had been filed by any of its members, and in 1926 in article 15 of regulation 43, part 2, it said:

> * * * Inasmuch as the tax on dues and initiation fees is paid by the person who pays the dues and fees (sec. 501 of the Act) it follows that any refund of the taxes can be legally made only to the club member who paid the tax. The law imposes upon the club the duty of collecting the tax and paying it over to the collector but it is not the taxpayer within the meaning of the law. Consequently, the club has no legal right on its own behalf to a refund of taxes on dues and fees paid by its members.

There has been no departure from this provision. The regulations today provide:

> * * * the members and not the clubs are the actual taxpayers. * * * (Sec. 101.56 Regulations 43, Revised 1940.)

I know of no decision to the contrary, except our own. I am of the opinion that the *Builders Club* case was erroneously decided and should be overruled.

In the *Builders Club* case we said this regulation requiring clubs to file powers of attorney from their members was invalid and need not be complied with. This taxpayer relied on what we said and did not comply with it. It now asks us for relief. Can we deny relief because it failed to comply with a regulation with which we said it need not comply?

Were this a court of last resort, I should be inclined to say that the plaintiff had a right to rely on our former decision and would be excused from complying with a regu-

lation we had held to be invalid. But this is not a court of last resort. Other courts may disagree with our view of the law, and sometimes do. They are not bound thereby. They may decide an identical issue in precisely the opposite way, and no one has a right to complain that they did not follow our decision. The Treasury Department is not bound by our decisions. It has the right in other cases to persist in its view of the law and to undertake to have its views sustained by other courts. It has the right to persist in its view until it is finally rejected by the Supreme Court. It has the right to come back before us and undertake to demonstrate to us that we were wrong in our prior decision. And, convinced of our error, it is our plain duty to correct it.

All of this must have been known to the plaintiff; at least, it is charged with that knowledge. That being so, was it entitled to rely on our decision in the *Builders Club* case? If not, it cannot complain if we should refuse to follow it. That opinion did not make the law, as an opinion of the Supreme Court would have done. It was dispositive of the case in which it was rendered, but, as a precedent, it was advisory only. It did not settle the law. It had no ultimate, controlling force. The final declaration of the law is committed to the Supreme Court. Until that court acts, litigants can rely on the opinions of intermediate or *nisi prius* courts only at their peril.

So when the plaintiff was confronted by the continued insistence of the Treasury Department that it comply with this regulation, it could refuse to do so only at its peril. The decision of this court gave it no absolute assurance that the regulation was invalid and could not be enforced. If plaintiff were appealing to some other court, our prior decision would not afford it protection. It must follow that it is not entitled to protection here, because the law before us is the same as it is before other courts. Courts may differ in their view of what the law is, but when the law has been finally determined, that law must be applied uniformly. It cannot be one thing before this court, and another thing before some other court.

Our prior decision having been erroneous, as I think, and the regulation having been valid and plaintiff not

having complied with it, I think that it is not entitled to recover.

I concur in the result reached by the majority for the foregoing reasons.

MIDPOINT REALTY COMPANY, INC., v. THE UNITED STATES

[No. 43130. Decided December 1, 1941]

On the Proofs

Income tax; affiliated group of corporations; statute of limitations.—Where the Commissioner of Internal Revenue on September 9, 1929, transmitted a letter to Salmon Realty Corporation and its affiliated corporations, including the plaintiff, setting forth the Commissioner's determination of the tax liability of the affiliated group for the calendar year 1924; and where said statement agreed with the statement of liability submitted on July 19, 1929, by plaintiff; and where, thereafter, by letter dated September 11, 1931, the Commissioner advised Salmon Realty Corporation and its various affiliated corporations, including the plaintiff, that the refund of certain of the overassessments set forth in said letter of September 9, 1929, was barred by the statute of limitations, it is *held* that the statute of limitations had run against the refund payments made by plaintiff on March 13, 1925, and on June 15, 1925, but it had not run as to payment made on September 14, 1925.

Same; account stated.—It is *held* that there was an implied promise on the part of the Commissioner to refund the payments made on September 14, 1925, against which the statute of limitations had not run and the plaintiff is accordingly entitled to recover, under the provisions of section 281 (a) of the Revenue Act of 1924 and section 284 (a) of the Revenue Act of 1926.

Same.—The facts support the allegation that there was an implied promise to pay on the part of the Commissioner; and plaintiff, having sued on this implied contract within six years, is entitled to recover.

The Reporter's statement of the case:

Mr. Ellsworth C. Alvord for the plaintiff. *Mr. Floyd F. Toomey* and *Alvord & Alvord* were on the briefs.

Mr. J. W. Hussey, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

In this case, as stated in the opinion of the court *post*, a decision was rendered, January 8, 1940, and a judgment in the sum of $3,840 was entered for the plaintiff. Thereupon the defendant filed a motion for new trial on the ground that the cause of action sued on accrued more than six years prior to the filing of the petition, which motion was granted on April 1, 1940 (90 C. Cls. 335) and the findings and opinion theretofore filed were amended in accordance with the opinion that day rendered (90 C. Cls. 345) and the judgment theretofore entered on January 8, 1940, was vacated and withdrawn and the plaintiff's petition was accordingly dismissed.

Subsequently on plaintiff's motion for a new trial the court on October 7, 1940 (91 C. Cls. 684), ordered that said motion be allowed and that the special findings of fact and the opinion of the court filed on January 8, 1940, as amended by the opinion filed April 1, 1940 and the judgment dismissing the petition April 1, 1940 (90 C. Cls. 335, 345), be vacated and withdrawn.

The court further ordered that the case be remanded to the General Docket and that unless the parties should be able to stipulate as to certain facts, set out in the order, the case be referred to a commissioner for the taking of testimony as to said facts.

The court, on December 1, 1941, upon the basis of the stipulation of facts entered into by the parties, the evidence adduced, and the report of a commissioner, made special findings of fact, as follows:

1. The plaintiff is a corporation organized under the laws of the State of New York, with its principal office and place of business in that State. During the calendar year 1924 it was affiliated with and was a subsidiary of Salmon Realty Corporation (now known as the Woodside Improvement Company), a Delaware corporation.

2. On June 15, 1925, plaintiff filed a separate income tax return for the calendar year 1924 disclosing a total tax liability of $15,355.55, which was paid as follows:

Reporter's Statement of the Case

On March 13, 1925	$4,000.00
On June 15, 1925	3,677.78
On September 14, 1925	3,840.00
On December 10, 1925	3,837.77
Total	15,355.55

On the same date, a consolidated return for the calendar year 1924, disclosing a total tax liability of $86,519.80, was filed by Salmon Realty Corporation for itself and various affiliated corporations, not including the plaintiff. Said amount was paid on or before December 10, 1925.

3. On June 9, 1927 the Commissioner of Internal Revenue requested information relating to the question whether the Salmon Realty Corporation and various of its affiliated corporations, including the plaintiff, were "affiliated" within the meaning of section 240 (c) of the Revenue Act of 1924.

4. Pursuant to that request, on July 29, 1927 the Salmon Realty Corporation, for itself and its affiliated corporations, including the plaintiff, filed with the Bureau of Internal Revenue a statement, sworn to by Albert T. Hunter, Secretary of the Salmon Realty Corporation, reading in part as follows:

STATE OF NEW YORK,
County of New York, ss:

Albert T. Hunter, being duly sworn, deposes and says: That he is Secretary of Salmon Realty Corporation; that he makes this affidavit as requested in and in reply to a letter addressed to the Salmon Realty Corporation, dated June 9, 1927, from the office of the Commissioner of Internal Revenue, Washington, D. C.

I. At least ninety-five per cent (95%) of the voting capital stock of the following corporations was acquired on the dates set opposite their names:

Midpoint Realty Co., Inc.—Prior to January 1, 1924.
Bryant Park Building, Inc.—Prior to June 1, 1925.
Hamilton Leasing Co., Inc.—Prior to June 1, 1925.

As to Midpoint Realty Co., Inc., through a misunderstanding this return was not included in our consolidated income-tax return prior to the year 1925; but we

are now preparing a revised statement to be filed for the years 1922, 1923, and 1924, showing proper adjustment for its inclusion.

* * * * * * *

(Signed) ALBERT T. HUNTER.

Sworn to before me this 29th day of July 1927.

(Signed) R. M. GEIGER.

5. Thereafter the Commissioner of Internal Revenue determined that the plaintiff was affiliated with Salmon Realty Corporation and its various other subsidiary corporations for the calendar year 1924, and proceeded to determine the tax liability of the group for that year in accordance with section 240 of the Revenue Act of 1924.

6. As a result of the foregoing, on July 19, 1929 the Commissioner of Internal Revenue transmitted a letter to the Salmon Realty Corporation and its affiliated corporations, including the plaintiff, setting forth his determination of the correct income-tax liability of said corporations for the calendar year 1924 on the basis of treating the plaintiff as a member of the affiliated group of which the Salmon Realty Corporation was the parent. There was forwarded with said letter a statement showing that the correct tax liability of the plaintiff for the calendar year 1924 was $6,139.93; that the tax previously assessed was $15,355.55; and that there was an overassessment of $9,215.62. With that letter there was transmitted Form 866, being "Agreement As to Final Determination of Tax Liability."

7. Upon receipt of the above-mentioned letter of July 19, 1929 the officers of the Salmon Realty Corporation and its affiliated corporations, including the plaintiff, examined the same and found that the aggregate overassessment of $28,908.51 agreed with their own figures, but the aggregate of the "Tax Previously Assessed" and the "Corrected Tax Liability" as found by the Commissioner differed from their figures. On August 8, 1929 a conference was held at the Bureau of Internal Revenue, at which these differences were discussed.

8. The Commissioner of Internal Revenue adopted plaintiff's figures and on September 9, 1929 transmitted a letter to

Salmon Realty Corporation and its various affiliated corporations, including the plaintiff, setting forth his determination of the tax liability of the affiliated group for the calendar year 1924. There was forwarded with said letter a revised statement showing that the correct tax liability of the plaintiff for the calendar year 1924 was $6,139.93; that the tax previously assessed was $15,355.55; and that there was an overassessment of $9,215.62. Said statement concluded as follows:

> Certificates of Overassessment for the amounts shown above will be issued through the office of the Collector of Internal Revenue for your district, and will be applied by that official in accordance with the provisions of Section 284 (a) of the Revenue Act of 1926.

Said letter enclosed a new form of "Agreement as to Final Determination of Tax Liability" (Form 866).

9. Salmon Realty Corporation and its various affiliated corporations, including the plaintiff, duly executed and transmitted to the Commissioner of Internal Revenue by letter dated October 11, 1929 said form of "Agreement as to Final Determination of Tax Liability" (Form 866). Said letter read as follows:

> We return herewith duly signed, as requested in your letter of September 9, 1929 (Symbols IT: AR–D, Law), Form 866–CR, being agreement as to a determination of tax liability for this company and its subsidiary and affiliated companies for the years 1923, 1924, and 1925 in an aggregate amount of $271,031.94, with the understanding, however, that this agreement is not to be in any way effective unless and until approved by the Secretary or Under Secretary in accordance with the provisions of Section 606 of the Revenue Act of 1928 and also with the understanding that refund or credit will be made of the overassessments in the aggregate amount of $28,908.51, as set forth in the schedule accompanying the Department's letter IT: AR: D Law, of September 9, 1929.

This particular form was not approved by the Secretary of Treasury by reason of the fact that it was determined by the Commissioner that a different form should be used.

10. Thereafter, by letter dated September 11, 1931, the Commissioner of Internal Revenue advised Salmon Realty Corporation, and its various affiliated corporations, that the refund of certain of the overassessments set forth in said letter of September 9, 1929, including the amount of $9,215.62 overpaid by the plaintiff, was barred by the statute of limitations.

11. On June 5, 1933 a new Form 866 was mailed to the plaintiff based in part upon the determination of the Commissioner of Internal Revenue set forth in his said letter of September 9, 1929 that there was an overassessment of income taxes paid by the plaintiff for the calendar year 1924 in the amount of $9,215.62. Said form was duly executed by Salmon Realty Corporation and its affiliated corporations, including the plaintiff, Midpoint Realty Company, Inc., and was transmitted by a duly authorized agent of said corporations to the Commissioner of Internal Revenue by letter dated August 1, 1933.

12. On November 22, 1933 the Secretary of the Treasury approved the form of "Agreement as to Final Determination of Tax Liability" (Form 866) transmitted with said letter of August 1, 1933, approval thereof appearing on schedule 7037. Thereafter, the Disbursing Officer of the Treasury prepared a check drawn on the Treasury of the United States in payment of the full amount of $9,215.62 overpaid by the plaintiff Midpoint Realty Company, Inc., for the year 1924, as set forth in the Commissioner's letter of September 9, 1929, together with interest thereon as provided by law.

13. On receipt of said check for approval the Comptroller General disallowed $5,377.85 of the principal amount set forth in said letter of September 9, 1929 as an overpayment by the plaintiff for the year 1924, on the theory that a timely claim for refund had not been filed with respect to that part of said overpayment.

14. On February 9, 1934 the sum of $3,837.77, with interest thereon to January 23, 1934, was refunded to the plaintiff. Likewise, on February 9, 1934, the Commissioner of Internal Revenue mailed to the plaintiff, Midpoint Realty Company,

Inc., a Certificate of Overassessment (No. 2286066; Schedule IT: 51921), setting forth that the overassessment of the plaintiff for the calendar year 1924 was in the amount of $9,215.62, but that of such amount only $3,837.77 was refundable, refund of the remainder being asserted to be barred by the statute of limitations. No part of the balance of $5,377.85 has been refunded or credited to the plaintiff.

15. Henry B. Fernald represented the Salmon Realty Corporation and its affiliated corporations before the Bureau of Internal Revenue in connection with the determination of the tax liabilities of the affiliated group for 1923, 1924, and 1925. Shortly after July 19, 1929 he was furnished with a copy of the letter of July 19, 1929 addressed to the Salmon Realty Corporation. Upon examining this letter he found that the amount of $199,391.97, stated in the "Agreement as to final determination of tax liability" as the corrected total tax liability, failed to include the correct tax liability of any of the subsidiary corporations of the Salmon Realty Corporation for the year 1925, although it included the corrected tax liability of the parent corporation (Salmon Realty Corporation) for that year. Fernald then prepared, as the authorized representative of the corporation, a schedule consisting of six pages. It showed "Total tax liability" of $271,031.94, exclusive of interest. It also showed "Allocation of Correct Tax" to each corporation for each of the years 1923, 1924, and 1925, and the amounts "not included in Department Agreement" for 1925. On August 8, 1929 Fernald presented a copy of this schedule to Messrs. Mansell and Whitney, of the Audit Review Division, Bureau of Internal Revenue, at which time Fernald explained to Mansell and Whitney the appropriate revisions which, in his opinion, should be made with respect to the Bureau's letter of July 19, 1929. Fernald was advised by the representatives of the Bureau that they would consider the schedule and that a revised letter would be forthcoming. Also at the conference of August 8, 1929 Fernald personally returned unexecuted the Department's proposed closing agreement to Messrs. Mansell and Whitney, the Bureau conferees. Following this the Commissioner wrote plaintiff on September 9, 1929 approving plaintiff's computation.

The court decided that the plaintiff was entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff's petition in this case was based in part on the theory that within six years prior to the time it brought its suit it and the Commissioner of Internal Revenue had agreed on the balance due it, and that the Commissioner had impliedly promised to pay the amount agreed to be due. In our opinion in this case delivered on January 8, 1940, 90 C. Cls. 335, we held that there had been an account stated, but not on the date alleged in the petition, to wit, September 9, 1929, but on an earlier date, August 8, 1929, and that there had been an implied promise to pay that part of the amount admitted to be due which was not barred by the statute of limitations. Inasmuch as plaintiff alleged that there had been an account stated on September 9, 1929, which was just less than six years prior to the time of the filing of the petition, and since neither party contended that the account had been stated on an earlier date, the defendant did not rely upon the statute of limitations as a defense. But when our opinion was delivered holding that the account had been stated on August 8, 1929, the defendant filed a motion for a new trial raising this defense. We granted the motion and dismissed the petition.

Whereupon the plaintiff filed a motion for a new trial asserting that we were in error in holding that the account had been stated on August 8, 1929, and that if given an opportunity to do so, it could offer further proof to demonstrate this fact. We granted plaintiff's motion and referred the case to a commissioner to take proof, among other things, as to what happened at the conference between plaintiff and the Commissioner's representatives on August 8, 1929. That proof has been taken, and the commissioner reports that on said date plaintiff's representative filed with the Bureau of Internal Revenue schedules setting forth what it believed was the correct computation of its tax liability, which showed an overpayment by the plaintiff of $9,215.62 for the year in question. Upon the filing of this computation the Commissioner of Internal Revenue's representative advised plaintiff

that they would consider the schedules filed and that a revised letter would be forthcoming.

The commissioner of this court finds that on that date, August 8, 1929, there was no agreement as to plaintiff's correct tax liability. The evidence supports this finding. Plaintiff was not advised that the defendant accepted its computation of its tax liability until receipt of the Commissioner's letter of September 9, 1929. Not until that date, we are now convinced, was there an agreement between the parties as to the amount due plaintiff. The petition in this case was filed within six years thereafter.

The statute of limitations had run against the refund of the two payments made by the plaintiff on March 13, 1925 and on June 15, 1925, but it had not run as to the payment made on September 14, 1925. There was no implied promise on the part of the Commissioner to refund the payments against which the statute had run, but there was an implied promise on his part to refund the payment made on September 14, 1925 amounting to $3,840.00. The statute commanded him to immediately refund any overpayment found to be due. (Sec. 281 (a) of the Revenue Act of 1924, 43 Stat. 253, 301, and sec. 284 (a) of the Revenue Act of 1926, 44 Stat. 9, 66.) Having agreed with plaintiff that there was an overpayment and the statute commanding him to immediately refund it, an implied promise to do so necessarily arose.

The case of *United States* v. *Kreider Co.*, 313 U. S. 443, is not in point, since the court held in that case that there was no account stated, because the facts negatived the allegation that there was an implied promise to pay. Here the facts support the allegation that there was an implied promise to pay, and plaintiff having sued on this implied contract within six years, it is entitled to recover.

Judgment will be rendered in favor of plaintiff and against the defendant for the sum of $3,840.00, with interest as provided by law. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

Syllabus

THE SIOUX TRIBE OF INDIANS, CONSISTING OF THE SIOUX TRIBE OF THE ROSEBUD INDIAN RESERVATION IN THE STATE OF SOUTH DAKOTA; THE SIOUX TRIBE OF THE STANDING ROCK INDIAN RESERVATION IN THE STATES OF NORTH DAKOTA AND SOUTH DAKOTA; THE SIOUX TRIBE OF THE PINE RIDGE INDIAN RESERVATION IN THE STATE OF SOUTH DAKOTA; THE SIOUX TRIBE OF THE CHEYENNE RIVER INDIAN RESERVATION IN THE STATE OF SOUTH DAKOTA; THE SIOUX TRIBE OF THE CROW CREEK INDIAN RESERVATION IN THE STATE OF SOUTH DAKOTA; THE SIOUX TRIBE OF THE LOWER BRULE RESERVATION IN THE STATE OF SOUTH DAKOTA; THE SIOUX TRIBE OF THE SANTEE INDIAN RESERVATION IN THE STATE OF NEBRASKA; AND THE SIOUX TRIBE OF THE FORT PECK INDIAN RESERVATION IN THE STATE OF MONTANA v. THE UNITED STATES

Santee Offset

[No. C-531 (12). Decided December 1, 1941]

On the Proofs

Indian claims; obligations under the treaty of 1868; offset allowed in previous suit.—The jurisdictional act (41 Stat. 738) under which this suit, and others, were brought provides that all claims of whatsoever nature which the Sioux Tribe of Indians may have against the United States "which have not heretofore been determined by the Court of Claims, may be submitted to the Court of Claims"; and the sole question in the instant case is whether under the terms of said act the plaintiffs are entitled to recover $1,903,023.22 heretofore paid to said plaintiffs by the defendant under the treaty of 1868 (15 Stat. 635) and subsequently charged as an offset against other claims of the plaintiffs litigated under the jurisdictional act of March 4, 1917 (39 Stat. 1195), and decided in the case of *Medawakanton Indians et al.* v. *United States*, 57 C. Cls. 357.

Held:

1. The obligations of the treaty of 1868 have been complied with, and the amounts due thereunder have been paid, both in fact and in effect.

2. The instant suit is based on the treaty of 1868, which has been fully complied with, and is not based on nonpayment of obligations of other treaties.

3. Conceding that in the *Medawakanton case, supra*, the court did not pass upon the merits of the offset in question but merely followed the mandatory direction of Congress in the jurisdictional act of 1917, and thus treating the question of said offset as before the court anew in the instant case, and considering all the equities under the jurisdictional act of 1920, the plaintiffs are not legally nor equitably entitled to recover.

The Reporter's statement of the case:

Mr. Ralph H. Case for the plaintiffs. *Messrs. James S. Y. Ivins* and *Richard B. Barker* were on the briefs.

Mr. Raymond T. Nagle, with whom was *Mr. Assistant Attorney General Norman M. Littell* for the defendant.

The court made special findings of fact as follows:

1. By the first two sections of an act of Congress approved June 3, 1920 (41 Stat. 738), it was provided

> That all claims of whatsoever nature which the Sioux Tribe of Indians may have against the United States, which have not heretofore been determined by the Court of Claims, may be submitted to the Court of Claims with the right of appeal to the Supreme Court of the United States by either party, for determination of the amount, if any, due said tribe from the United States under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds or lands of said tribe or band or bands thereof, or for the failure of the United States to pay said tribe any money or other property due; and jurisdiction is hereby conferred upon the Court of Claims, with the right of either party to appeal to the Supreme Court of the United States, to hear and determine all legal and equitable claims, if any, of said tribe against the United States, and to enter judgment thereon.
>
> SEC. 2. That if any claims or claims be submitted to said courts they shall settle the rights therein, both legal and equitable, of each and all the parties thereto, notwithstanding lapse of time or statutes of limitation, and any payment which may have been made upon any claims so submitted shall not be pleaded as an estoppel, but may be pleaded as an offset in such suits or actions, and the

> United States shall be allowed credit for all sums heretofore paid or expended for the benefit of said tribe or any band thereof. The claim or claims of the tribe or band or bands thereof may be presented separately or jointly by petition, subject, however, to amendment, suit to be filed within five years after the passage of this Act; and such action shall make the petitioner or petitioners party plaintiff or plaintiffs and the United States party defendant, and any band or bands of said tribe or any other tribe or band of Indians the court may deem necessary to a final determination of such suit or suits may be joined therein as the court may order. Such petition, which shall be verified by the attorney or attorneys employed by said Sioux Tribe or any bands thereof, shall set forth all the facts on which the claims for recovery are based, and said petition shall be signed by the attorney or attorneys employed, and no other verification shall be necessary. Official letters, papers, documents, and public records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys of said tribe or bands thereof to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys for said tribe or bands of Indians.

2. The real party at interest is the Santee Tribe or Band of Sioux Indians of the Santee Indian Reservation in the State of Nebraska.

3. On September 29, 1837 (7 Stat. 538), a treaty was made by the United States with certain chiefs and bands of the Sioux Nation of Indians, purporting to have been signed by members of the Medawakanton Band alone, by the first article of which said Indians ceded to the United States all their land east of the Mississippi River and all their islands in said river.

In consideration of said cession the United States, by Article 2, agreed, among other things, to invest the sum of $300,000.00 and to pay to said Indians the interest thereon at the rate of not less than five per centum forever.

4. By the treaty of 1851 (10 Stat. 954) plaintiff bands of Indians ceded their interest in certain lands to the United States and bound themselves to perpetual peace with the United States.

The United States, among other things, undertook to provide a trust fund of $1,160,000.00 (later increased to $1,229,-

000.00 by Senate amendment), with interest thereon at five per centum commencing July 1, 1852, to be paid annually to plaintiff bands for a period of 50 years, the payment to be in full discharge of the trust fund and interest at the end of 50 years.

5. In August 1862 an outbreak occurred among the annuity Sioux in Minnesota, consisting of the plaintiffs and the Sisseton and Wahpeton Bands, during which a large number of white settlers was massacred and a vast amount of property destroyed. In consequence of this outbreak Congress passed the act of February 16, 1863 (12 Stat. 652), which abrogated and annulled all treaties between said Indians and the United States, declared all lands and right of occupancy within the State of Minnesota and all annuities and claims theretofore accorded to said Indians, or any of them, to be forfeited to the United States (*Medawakanton Indians et al.* v. *United States*, 57 C. Cls. 357, 362, Finding V).

6. On April 29, 1868, the Sioux Indians, including the Santees, entered into a treaty of amity with the United States (15 Stat. 635) by which the United States agreed to supply the Indians with buildings, money, clothing, and other beneficial objects and facilities, the consideration moving from the Indians being that they were to keep the peace toward the whites and would withdraw opposition to the construction of certain railroads and military posts. Former treaties were declared abrogated in so far as they gave rights to money, clothing, and articles of property promised in prior treaties.

By this treaty the defendant was obligated to and did expend for the benefit of the plaintiffs the sum of $1,903,-023.22 during the period from 1870 to 1921.

7. By Special Act of Congress approved March 4, 1917 (39 Stat. 1195), entitled "An Act for the restoration of annuities to the Medawakanton and Wahpakoota (Santee) Sioux Indians, declared forfeited by the Act of February sixteenth, eighteen hundred and sixty-three," among other things, it was provided

> **That jurisdiction be, and hereby is, conferred upon the Court of Claims to hear, determine, and render final judgment for any balance that may be found due the Medawakanton and Wahpakoota Bands of Sioux In-**

dians, otherwise known as Santee Sioux Indians, with right of appeal as in other cases, for any annuities that may be ascertained to be due to the said bands of Indians under and by virtue of the treaties between said bands and the United States, dated September twenty-ninth, eighteen hundred and thirty-seven (Seventh Statutes at Large, page five hundred and thirty-eight), and August fifth, eighteen hundred and fifty-one (Tenth Statutes at Large, page nine hundred and fifty-four), as if the Act of forfeiture of the annuities of said bands approved February sixteenth, eighteen hundred and sixty-three, had not been passed: *Provided*, That the court in rendering judgment shall ascertain and include therein the amount of accrued annuities under the treaty of September twenty-ninth, eighteen hundred and thirty-seven, up to the date of rendition of judgment, and shall determine and include the present value of the same, not including interest, and the capital sum of said annuity, which shall be in lieu of said perpetual annuity granted in said treaty; and to ascertain and set off against any amount found due under said treaties all moneys paid to said Indians or expended on their account by the Government of the United States since the treaties were abrogated by the Act of February sixteenth, eighteen hundred and sixty-three: *Provided*, That the treaty of April twenty-eighth, eighteen hundred and sixty-eight, shall not be a bar to recovery, but all equities and benefits received thereunder by the Santee Sioux Indians shall be taken into consideration in the determination of the amount of recovery. Upon the rendition of such judgment and in conformity therewith the Secretary of the Interior is hereby directed to ascertain and determine which of said Indians now living took part in said outbreak and to prepare a roll of the persons entitled to share in said judgment by placing thereon the names of all living members of said bands residing in the United States at the time of the passage of this Act, excluding therefrom only the names of those found to have personally participated in the outbreak; and he is directed to distribute the proceeds of such judgment, except as hereinafter provided, per capita, to the persons borne on the said roll.

8. Pursuant to such act the Indians named in Finding 7 filed suit and judgment was rendered in favor of such Indians against the defendant, after allowing offsets, in the sum of $386,597.89 (*Medawakanton Indians et al.* v. *United States*, *supra*).

The court held that had the treaties of 1837 and 1851 remained in effect from the dates of such treaties to the date of judgment the annuities payable under such treaties would have aggregated $4,652,750.00. In calculating this sum the court included payment of the principal sum of $300,000.00 set apart as an investment for plaintiff Indians under the treaty of 1837, and also allowed them interest on such principal sum from date of such treaty to the date of rendition of judgment (Finding XVII, p. 371).

The court offset $2,353,128.89 under those provisions of the jurisdictional act which related to "moneys paid to said Indians or expended on their account by the Government of the United States since the treaties were abrogated by the Act of February Sixteenth, Eighteen Hundred and Sixty-three." This included annuity payments, depredation claims, payments of debts, and other expenditures not connected with the treaty of 1868 (Findings III to XV, incl., summarized in Finding XVII, p. 371).

The court also deducted $1,903,023.22 expended between 1870 and 1921 for the benefit of the Santees under the treaty of 1868 (Finding XVI, p. 371).

9. The Indians in whose behalf this suit is brought, now known as the Santee Sioux, were the parties plaintiff in the *Medawakanton* case. The history of the changes in name, migrations, and habitats of the bands is not material to this action but may be found in the report of the above-mentioned case.

10. The present suit is to recover the sum of $1,903,023.22 expended for the benefit of plaintiffs under the treaty of 1868, on the ground that as this sum was set off against obligations under previous treaties, the defendant, in effect, did not expend such sums under the treaty of 1868.

The court decided that the plaintiff was not entitled to recover.

JONES, *Judge*, delivered the opinion of the court:

The jurisdictional act under which this suit is brought is set out in the findings. It provides that all claims of whatsoever nature which the Sioux Tribe of Indians may have against the United States "which have not heretofore been

determined by the Court of Claims, may be submitted to the Court of Claims."

Under the terms of the act several suits were filed. The basis of the present suit has been narrowed to the single question of whether under the terms of the act conferring jurisdiction the plaintiffs are entitled to recover $1,903,023.22 heretofore paid to them by the defendant under the treaty of 1868 (15 Stat. 635) and subsequently charged as an offset against other claims of the plaintiffs litigated in the case of *Medawakanton Indians et al.* v. *United States*, 57 C. Cls. 357.

Briefly, by the treaty of September 29, 1837 (7 Stat. 538), the Sioux Nation of Indians ceded certain lands to the United States and the United States agreed to invest for the benefit of such Indians the sum of $300,000.00 and to pay them interest thereon at the rate of not less than 5 per centum forever.

By the treaty of August 5, 1851 (10 Stat. 954) the defendant, as consideration for the cession of certain lands, established an additional trust fund in the sum of $1,160,-000.00 (increased in the Senate by amendment to $1,229,-000.00) with interest thereon at 5 per centum, commencing July 1, 1852, to be paid annually over a period of fifty years, such fifty payments to discharge both principal and interest.

In the year 1862 a serious outbreak occurred among the Indians of Minnesota during which many white people were killed and much property destroyed.

Following this outbreak, the Congress on February 16, 1863, abrogated and annulled all treaties theretofore made and entered into by certain tribes of the Sioux Indians, including the ones at interest in this cause, in so far as said treaties, or any of them, purported to impose any future obligation on the United States. All lands and rights of occupancy within the State of Minnesota, and all annuities and claims theretofore accorded the said Indians, or any of them, were declared to be forfeited to the United States. It was cited as a reason for such cancellation that "during the past year the aforesaid bands of Indians made an unprovoked, aggressive, and most savage war upon the United States, and massacred a large number of men, women, and

children within the State of Minnesota, and destroyed and damaged a large amount of property" (12 Stat. 652).

On April 29, 1868, the Sioux Indians, including the parties at interest herein, entered into a treaty of amity with the United States (15 Stat. 635). By the terms of this treaty certain lands therein described were set apart for the tribes of the Sioux Indians and the United States agreed to furnish the Indians certain monies, clothing, and articles of property and educational facilities.

It was also stipulated by Article 17 of such treaty that it should have the effect and should be construed "as abrogating and annulling all treaties and agreements heretofore entered into between the respective parties hereto, so far as treaties and agreements obligate the United States to furnish and provide money, clothing, or other articles of property to such Indians and bands of Indians as become parties to this treaty."

By the terms of this treaty the United States expended on behalf of the Indians between the years 1870 and 1921 the sum of $1,903,023.22.

On March 4, 1917, the Congress by special act (39 Stat. 1195), conferred jurisdiction upon the Court of Claims to hear, determine, and render final judgment for any balance found due to certain bands of Indians, parties at interest herein, for any annuities that might be ascertained to be due said bands of Indians under the treaties of 1837 and 1851 heretofore referred to.

Pursuant to this act, suit was filed and the Court of Claims, after exhaustive investigation, rendered judgment for plaintiff Indians in that suit in the net sum of $386,597.89.[1]

The Court of Claims calculated the different sums provided for plaintiff Indians under the two treaties mentioned, and also calculated the different offsets which the defendant should be allowed for expenditures made, and arrived at the balance due the plaintiff Indians under the terms of the jurisdictional act.

Among the sums allowed to the defendant as an offset in that case was $1,903,023.22 expended in behalf of the Indians under the treaty of 1868, supra.

[1] *Medawakanton Indians et al.* v. *United States*, 57 C. Cls. 357. 371. 379.

This sum is the controverted issue in this case.

Plaintiffs contend that the expenditure of this sum was required as an obligation of the treaty of 1868; that it had no connection whatever with the obligation of the previous treaties, and that under the jurisdictional act of 1917, *supra*, the Court of Claims had no choice but to allow the offset, that the effect of the court's action was to reimburse the defendant for an obligation that was due and owing to the plaintiffs, and that "in effect, therefore, the defendant never expended for the benefit of the plaintiffs the sum of $1,903,023.22 that it was compelled to expend for them under the terms of the treaty of April 29, 1868. * * * because it legally but unjustifiably recouped itself."

The defendant contends:

(1) That the court is without jurisdiction because, in the decision under the jurisdictional act of 1917, it already had determined the validity and legality of the offset of $1,903,023.22;

(2) That plaintiffs' claim is barred under the doctrine of *res judicata;*

(3) That plaintiffs are estopped to deny the legality and validity of the offset, because they accepted the benefits of the jurisdictional act of 1917; and

(4) That, on the merits, the plaintiffs would not be entitled to recover.

The parties in interest were also the parties plaintiff in *Medawakanton Indians et al.* v. *United States*, *supra*. Certain changes in name and residence of the bands are not material to this action. Any interests of any of the other plaintiffs named in this suit are covered by the same principles and facts enunciated here. The Sioux Tribe of Indians, the nominal plaintiffs in this action, include the Santee Indians for whose benefit this suit is brought.

We do not think plaintiffs are entitled to recover.

It will be noted that the act of 1920 (41 Stat. 738), under which this suit is brought, confers jurisdiction to hear and determine all claims, "which have not heretofore been determined by the Court of Claims."

The defendant insists that the quoted clause leaves the court without jurisdiction by virtue of the decision in the *Medawa-*

kanton case, *supra*, wherein the sum herein sued for was applied as a setoff against obligations under previous treaties. It cites as sustaining authority the case of *Eastern or Emigrant Cherokees* v. *United States*, 82 C. Cls. 180 (certiorari denied 299 U. S. 551).

Apparently recognizing the force of this contention, the plaintiffs do not sue for any unpaid balances under the treaties of 1837 or 1851, but bottom their suit on the allegation that the obligations under the treaty of 1868 are "in effect" unpaid.

We quote from plaintiffs' brief:

> In the prior suit the plaintiffs' cause of action was limited to their rights under their annuity treaties of 1837 and 1851. No cause of action was given the plaintiffs as to their rights under the Treaty of April 29, 1868. Thus, the present suit is not premised upon any prior claim of the plaintiffs before this Court.

Plaintiffs' suit therefore is based primarily on alleged violations of the treaty of 1868, or failure to fulfill its obligations. They admit that over the period of fifty years the defendant complied with all its terms, but insist that since that amount was applied as an offset in a suit to recover payments under previous treaties, the money was in effect not expended.

This seems rather a strained construction.

Full payment was actually made under the treaty of 1868. None of the money was ever returned by the plaintiffs. In the suit under the 1917 act for unpaid balances under the theretofore abrogated treaties of 1837 and 1851, the court offset or reduced the payments called for in such treaties by the amount of the payments under the treaty of 1868.

It naturally follows that the obligations of the 1868 treaty have been met. If any part of any obligations remains unpaid it is a part of the obligations of the treaties of 1837 and 1851, which on the direct issue were reduced by a pleaded offset.

Plaintiffs insist that while the obligations of the treaty of 1868 have been paid, they have not "in effect" been paid. We almost get lost on the way. We are unable to follow this meandering type of logic.

We hold that the obligations of the treaty of 1868 have been complied with both in fact and in effect.

By the terms of the jurisdictional act of 1917 the Court of Claims was authorized to go fully into the claims of the plaintiff Indians under the treaties of 1837 and 1851 as if the act of forfeiture had not been passed, and to ascertain the amount of any unpaid obligations under such treaties; and to ascertain and set off against any amount found due under said treaties all monies paid to said Indians or expended on their account by the Government of the United States, subsequent to the abrogation of the treaties by the act of 1863, *supra*. It was further provided that the treaty of 1868 "shall not be a bar to recovery, but all equities and benefits received thereunder by the Santee Sioux Indians shall be taken into consideration in the determination of the amount of recovery."

The court, in the *Medawakanton* case, interpreted the special act as conferring jurisdiction to pass upon these particular items and has rendered judgment in the matter, which is final and conclusive.[2]

As we read the opinion, the court decided, and we think properly so, that the act of 1917 required the offset of any payments made under the treaty of 1868. It is difficult to ascertain from the language in the brief what is the precise contention plaintiffs make on this point. Expressed in our own language, we construe such contention to be that the deduction by the court was a purely mechanical thing, a matter of calculation, and that the question of whether the offset should be made as a matter of justice was never before the court, it having been predetermined by the Congress which wrote the act.

If this viewpoint is accepted, and there is strength to the position, we are still face to face with the fact that this suit is based on the treaty of 1868, which has been fully complied with, and is not based on non-payment of obligations of earlier treaties.

Even conceding that the court in the *Medawakanton* case did not pass upon the merits of whether the offset in question should be allowed, but merely followed the mandatory direction of the Congress, thus treating the entire question as

[2] *Stoll* v. *Gottlieb*, 305 U. S. 165; *Lambert* v. *Central Bank of Oakland*, 85 Fed. (2d), 954, certiorari denied 300 U. S. 658; *United States* v. *California & Oregon Land Co.*, 192 U. S. 355.

before us anew, and considering all the equities under the jurisdictional act of 1920, we do not think that plaintiffs are legally or equitably entitled to recover.

Under the earlier treaties defendant obligated itself to pay to plaintiffs certain annuities. Following the outbreak in 1862 any further obligation under these treaties was declared to be forfeited.

Later the treaty of 1868 was entered into, under which certain expenditures were promised and paid, with the proviso that all the unpaid obligations of the previous treaties should continue to be barred.

The jurisdictional act of 1920, under which this suit was instituted, stipulated that all claims of whatsoever nature

> * * * which have not heretofore been determined by the Court of Claims, may be submitted to the Court of Claims * * * for determination of the amount, if any, due said tribe from the United States under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds or lands of said tribe or band or bands thereof, or for the failure of the United States to pay said tribe any money or other property due.

The act further provided that

> * * * any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel, but may be pleaded as an offset in such suits or actions, and the United States shall be allowed credit for all sums heretofore paid or expended for the benefit of said tribe or any band thereof.

To allow the plaintiffs to recover annuities under abrogated treaties and to retain without offset the benefits received under the treaty of 1868 would be inequitable. To permit the previous treaties and the treaty of 1868 which was entered into in lieu thereof, and which contained a provision that payments under previous treaties were barred, to nevertheless run concurrently, and to give full payment under all the treaties, would constitute double payment. But for the uprising in 1862, with the consequent cancellation of the previous treaties, the provision for payment under the treaty of 1868 would probably never have been made. Hence, to authorize full payment under the revitalized pre-

vious treaties, plus full payment under the substituted treaty of 1868 covering the same period, would be equivalent to allowing a man to take advantage of his own wrong. Neither the history of the treaties nor the language of the act of 1920 justifies such an interpretation.

As shown by the special acts, Congress evidently desired that the plaintiffs should have the benefit of the treaties that promised the larger benefits, but not both these and the treaty of 1868 at the same time.

A generous Congress has restored the benefits of treaties that had been annulled, and provided in the act of restoration that the United States should be allowed credit for all sums paid or expended for the benefit of the plaintiff tribe. It is equitable that the payments made under the treaty of 1868 in lieu of the forfeited annuities should be recognized as a just offset in the general accounting.

It follows that plaintiffs' petition must be dismissed, and it is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

FRED J. RICE AND W. CAMERON BURTON, RECEIVERS FOR D. C. ENGINEERING COMPANY, INC., v. THE UNITED STATES

[No. 43269. Decided December 1, 1941]*

On the Proofs

Government contract; excess cost due to delay; responsibility of defendant.—Under the facts disclosed by the record, the provisions of plaintiff's contract, the representations of the defendant's contracting officer as to the period during which the general construction work should be performed, and the statements and representations in the specifications and drawings relating to all work upon the entire project, upon all of which plaintiff had a right to rely, and did rely, in making its bid for furnishing and installing plumbing, heating and ventilating equipment at the Veterans' Administration Hospital Building at Togus, Maine; it is *held* that plaintiff is entitled to recover $9,349.95 of the total excess cost of $26,044.64 incurred by reason of delay due to defendant.

*Certiorari granted April 13, 1942.

Same.—Time was an essence of plaintiff's contract with defendant, and nowhere in the contract or specifications for the work covered by said contract nor in defendant's contract and specifications for construction of the building in which plaintiff was to perform its work was the defendant relieved of responsibility for a liability to plaintiff for excess costs by reason of delay for which plaintiff was in no way responsible. *Wood et al.* v. *United States*, 258 U. S. 120, and similar cases distinguished.

Same; unforeseen conditions.—The fact that a condition encountered, which causes delay, is unforeseen or unanticipated does not render the delay unavoidable and is not enough to relieve the contracting party, whose contractual duty it is to overcome it, from responsibility for damages to the other party from the delay caused by such conditions. *Carnegie Steel Co.* v. *United States*, 49 C. Cls. 403, affirmed 240 U. S. 156, cited.

The Reporter's statement of the case:

Mr. R. Aubrey Bogley for the plaintiffs. *Messrs. McKenney, Flannery & Craighill* were on the brief.

Mr. Elihu Schott, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Rawlings Ragland* was on the brief.

Plaintiffs, as receivers, seek to recover $26,044.64 representing the total loss sustained by the D. C. Engineering Company under its contract with defendant for furnishing and installing plumbing, heating, and ventilating equipment at the Veterans' Administration Hospital Building constructed by the defendant under a separate contract at Togus, Maine.

The theory upon which plaintiffs seek to recover the amount stated is that defendant had agreed and was obligated to prepare the site and to construct the building in which the D. C. Engineering Company was to perform the work called for by its contract within 250 days after commencement of construction operations in the spring of 1932; that inasmuch as the building was not ready for the work to be performed therein by the D. C. Engineering Company until October 8, 1932, or 149 days after plaintiff had been given notice to proceed, and plaintiff was further delayed for an additional period of 48 days at the end of the construction program, which required a total of

510 days, or 260 days in excess of the originally fixed period, the defendant is liable under its contract with the D. C. Engineering Company for the total excess cost of $26,044.64 alleged to have been caused by this delay.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiffs are the receivers of the D. C. Engineering Co., Inc., a District of Columbia corporation, having been duly so appointed by the Supreme Court of the District of Columbia February 7, 1934, and by that court authorized to institute and prosecute this suit.

Prior to March 12, 1932, the Government, through the Veterans' Administration, decided to construct a large Veterans' Hospital at Togus, Maine, known as Veterans' Administration Home, and to do all work necessary to complete the project by separate contracts for (1) general construction; (2) plumbing, heating, and electrical work; (3) electric elevators; and (4) a refrigerating plant. Accordingly, detailed specifications and drawings were prepared by the Government through the Veterans' Administration construction service for the four classes of work mentioned. The specifications for the entire project were in one volume. The general conditions set forth in the specifications were applicable to each contract to be entered into between the Government and the successful bidder for each classification of work, the single standard form of contract to be separately executed by each successful bidder for the classification of work covered by his bid, and the detailed specifications applicable thereto. The plans and drawings for the entire work to be performed by all the contracts with the Government either accompanied the specifications or were made available to all bidders. The standard form of contract subsequently entered into between the Government and each successful bidder contained at the time of execution only such additions as were necessary to describe the nature of the work to be performed thereunder and the contract price therefor.

March 12, 1932, an invitation for bids was prepared and issued in a single document for the four classifications of work, a copy of which, together with all the specifica-

tions for the entire project, was furnished to prospective bidders. This invitation for bids, so far as pertinent here, was as follows:

> SEALED BIDS, in triplicate, subject to the conditions contained herein, will be received by the Veterans Administration April 19, 1932, and then publicly opened for furnishing all labor and materials and performing all work required for constructing and finishing complete at VETERANS ADMINISTRATION HOME, TOGUS, MAINE, *Hospital Building*. This work will include excavating, roads, walks and drainage, reinforced concrete, hollow tile, brickwork, cut stone, architectural terra cotta, slate stair treads, marble work, terrazzo floor and wall tile, rubber tile, compressed asphalt tile and lineoleum floors, iron work, steel sash, steel stairs, steel shelving, cabinets and partitions, metal and built-up roofing, roof ventilators, skylights, lightning conductors, metal lathing, plastering, sound deadening, carpentry, metal weatherstrips, insect screens, linen chute, platform scales, painting, glazing, hardware, plumbing, refrigerating, heating and ventilating, electrical work, electric elevators, and outside distribution systems, and such other items as shown or specified. *Separate bids* will be received for (a) General Construction; (b) Plumbing, Heating, and Electrical Work; (c) Electric Elevators; and (d) Refrigerating Plant; all as set forth on bid form.
>
> *   *   *   *   *
>
> Bids must be submitted upon the Standard Government Form of Bid and the successful bidder will be required to execute the Standard Government Form of Contract for Construction.
>
> Time of performance will be an essence of the contract and bids will be evaluated on the basis of time. In evaluating bids there will be added to each bid other than the one offering to complete in the shortest time an amount equal to the daily liquidated damages named in the Invitation for Bids, multiplied by the number of calendar days that such bidders have named for performance of the work in excess of the days named by the bidder proposing to do the work in the shortest time.

The invitation for bids, as well as paragraph 37 of the specifications and art. 9 of the standard contract form, provided that liquidated damages for delay by failure of the

contractor to complete the work included in his bid within the time specified would be at the rate of $130 a day for "general construction"; $70 a day for "plumbing, heating, and electrical work"; $10 a day for "electric elevators"; and $10 a day for "a refrigerating plant".

As a part of the invitation for bids the Government, in writing, advised all prospective bidders that it was the general intention that the contractor for general construction would, unless otherwise specified, completely prepare the site for building operations and furnish all labor and materials required to construct and finish complete as shown on the drawings, as described by the specifications, and as noted in his bid, upon which an award might be made, the one hospital building, and roads, walks, grading and drainage, etc., and that the mechanical equipment covered by contracts made upon awards therefor under separate bids would be installed in the building as its construction progressed, as called for in the construction contract and specifications. Par. 7 of the specifications and art. 13 of the contracts provided that each contractor should fully cooperate with other contractors and carefully fit his own work to that provided under other contracts as might be directed by the contracting officer, and that no contractor should commit or permit any act which would interfere with the performance of work by any other contractor.

The bidder for general construction work of erecting the hospital building was required by the invitation for bids and the specifications to state the time within which such work would be completed, and time of performance was to be an essence of the contract between the Government and the contractor for general construction; the specifications relating to plumbing, heating, electrical work, and other mechanical work, provided that the general conditions set forth therein would govern where applicable all work in connection with plumbing, heating, and other mechanical work, and further provided as follows:

> TIME FOR COMPLETION: All work under this section [plumbing, heating, etc.] of the specification shall be completed at a date not later than that provided for in the contract for General Construction (see construc-

tion section of specification and bid forms for the completion of work under that contract.) Failure to comply with the above will result in the deduction of liquidated damages from contract payments as hereinbefore provided under "General Conditions".

2. Chas. Smith & Sons, Inc., of Hartford, Conn., was the successful bidder for the work of constructing and finishing complete the hospital building, together with all roads, walks, grading and drainage in connection therewith. On April 21, 1932, this company and the Government through L. H. Tripp, Director of Construction, Veterans' Administration, as contracting officer, entered into the standard form of contract for this work for a total consideration of $374,-000, and art. 1 of this contract provided that "The work shall be commenced within ten (10) calendar days after date of receipt of notice to proceed and shall be completed within two hundred and fifty (250) calendar days after date of receipt of notice to proceed."

On or shortly before April 19, 1932, the date specified in the invitation for bids issued March 12, 1932, the D. C. Engineering Co., Inc., hereinafter referred to as plaintiff, submitted its bid for plumbing, heating, and electrical work called for by the specifications and drawings to be installed in the hospital building to be constructed by defendant under a separate contract, and stated that it would complete the same within the period fixed by the Government in its contract for general construction for a price of $89,500, in accordance with specifications, schedules, and drawings prepared and furnished by the Government. The printed Government bid form stated "The above bid is made with the understanding that all work covered thereby will be completed at a date not later than that provided in the contract for General Construction." Plaintiff's bid was accepted by the Government and, on April 29, 1932, the plaintiff and the United States, represented by L. H. Tripp, Director of Construction, Veterans' Administration, as contracting officer, executed the standard form of contract, which, with the exception of description of the work to be performed thereunder, was, in all respects, identical with the

contract between the Government and the contractor for the work of constructing the building.

3. May 9, 1932, the Government through its contracting officer gave Chas. Smith & Sons, Inc., the contractor for general construction, notice to proceed, and on May 12 gave plaintiff written notice to proceed as follows:

> You are hereby notified to proceed with the installation of Plumbing, Heating, and Electrical Work at Veterans' Administration Hospital, Togus, Maine, as contemplated by Contract VAc-196, dated April 29, 1932, your copy of which is attached. The performance bond signed by you and the Globe Indemnity Company, 150 William Street, New York City, N. Y., in support of this contract, has been approved and is on file with the Service record of this agreement.
>
> It will be noted that the contract provides for completion of the work at a date not later than that provided for in the contract for General Construction. The General Construction work is due for completion within 250 Calendar Days after May 9, 1932.

Under these notices to proceed, the work of constructing the building and the work of furnishing and installing therein the plumbing, heating, and electrical equipment were due for completion January 14, 1933. The progress of plaintiff's work under its contract was dependent upon progress of the general construction work being performed by the Government under a separate contract.

4. At the time of preparing its bid, plaintiff, being aware of the importance to it of the period for performance under its contract if it was the successful bidder, conferred with the Director of Construction of the Veterans' Administration, who was the Government's contracting officer, to determine when the work of constructing the hospital building would commence and the period of the year during which it would be prosecuted. The contracting officer advised plaintiff that construction work would commence in early spring of 1932 as soon as weather conditions would permit so that the building would be under roof and enclosed before cold weather set in during the following months. Plaintiff made its bid in reliance upon that advice and upon the basis of the provisions of the standard form

of contract and the specifications. Plaintiff was ready to proceed and perform the work called for by its contract at all times on and after the date on which it received notice to proceed.

Plaintiff's contract provided in art. 1 that "The work shall be commenced promptly after date of receipt of notice to proceed and shall be completed at a date not later than that provided for in the contract for general construction." Art. 3 of plaintiff's contract and, also, of the contract between defendant and Chas. Smith & Sons, Inc., for general construction provided that the contracting officer might at any time by written order make changes in the drawings and specifications of the contract, or in either, and within the general scope therof, and that if such changes caused an increase or decrease in the amount due under the contract, or in the time required for its performance, an "equitable adjustment shall be made and the contract shall be modified in writing accordingly;" that any claim for adjustment must be asserted within ten days from the date the change is ordered, unless the contracting officer should extend the time, and that if the parties could not agree upon the adjustment the dispute should be determined as provided in art. 15 of the contract; but that nothing in that article should excuse the contractor from proceeding with prosecution of the work so changed.

Art. 4 of both contracts provided that should the Government discover, during progress of the work, subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the contracting officer should promptly investigate the conditions and if he found that they materially differed from those shown on the drawings or indicated in the specifications he should at once make such changes in the drawings and specifications as he might find necessary, "and any increase or decrease of cost and (or) difference in time resulting from such changes, shall be adjusted as provided in Article 3 of this contract."

Art. 15 provided that all disputes concerning questions of fact arising under the contract should be decided by the contracting officer or his authorized representative, sub-

ject to appeal by the contractor within thirty days to the head of the department, whose decision should be final and conclusive upon the parties thereto as to such questions of fact, and that, in the meantime, the contractor should diligently proceed with the work as directed.

The defendant's specifications relating to excavation and foundation work in connection with construction of the building within which plaintiff was to install the mechanical equipment called for by its contract, and which specifications were furnished to plaintiff when bids were called for, provided (1 C–1, par. 2) that the contractor for general construction would clear the site of the building "and do all necessary excavating to the dimensions and levels shown on drawings for basements, areas, foundations, footings, walls, floors, and all work shown;" that should rock, within the definition of the specifications, be encountered within the limits of the required excavations payment for removal thereof would be made subject to such adjustment as provided by articles 3 and 4 of the contract; that only solid ledge rock or rock that could not be removed with pick or wedge, or boulders exceeding 12 cubic feet in bulk, should be considered as rock; that the bottom of all excavations for foundations should be properly leveled off and footings placed on undisturbed soil; that excavations should not be carried lower than required for footings, foundations, etc., as shown on the drawings; that work of excavating to the dimensions as shown on the drawings as required by the nature of the soil, or for additional construction, would be paid for as an extra in accordance with the contract. This specification further provided as follows:

> Excavate to ledge for all piers, columns, footings, foundations, etc. The approximate location of ledge is shown on drawings. All supporting members, piers, walls, etc., must rest on solid rock ledge. The location of ledge shown on drawings is approximate, but as accurate as possible from available data. This contractor will remove all materials to ledge where required for all walls, piers, etc., under this contract but any ledge necessary to remove will be adjusted according to the contract. All bearing masonry shall rest on level beds on ledge. No sloping or rough rock beds will be permitted.

5. The defendant through its contractor for general construction started construction work immediately after May 9, 1932, and sometime prior to June 4, 1932, plaintiff received notice from defendant's general contractor that sufficient progress on the general construction work would be made by June 6, 1932, to enable plaintiff to commence and thereafter prosecute its work. Upon receipt of this notice plaintiff proceeded to employ its superintendent and prior to June 4 it shipped to the site of the work $2,500 worth of tools and equipment and several carloads of plumbing, heating, and electrical material to be installed in the building under its contract. On June 6 plaintiff's president and its superintendent arrived at the site of the work to begin operations, and, upon arrival, plaintiff found that 80 percent of the work of excavating for foundations of building had been done, but that, on that date, all work by the general contractor had been stopped by the defendant due to the encountering of subsurface conditions materially differing from those shown on the drawings and set forth in the specifications. The defendant through its contractor for general construction had commenced excavation work May 11, but before June 6 changed conditions were encountered and the defendant discovered that the foundations for the building could not be constructed as shown on the drawings and as set forth in the specifications because of the fact that, over a large portion of the foundation area, instead of finding proper foundation bearings, as shown on the drawings and as stated in the specifications, soft sand, and a great deal of water and quicksand were encountered. Thereupon the contracting officer ordered all construction work stopped pending decision as to what should be done. All general construction work in connection with foundations for the building remained under suspension by order of the contracting officer from about June 4 until August 9, 1932. In the meantime, the defendant at its own expense carried on exploration work in connection with which numerous test pits were dug to much greater depths and dimensions than originally called for and numerous bearing tests were made therein for the purpose of ascertaining whether adequate foundation support could be secured on the original

site and for the purpose of securing the information necessary for preparation of new drawings to meet and overcome the conditions encountered in connection with the foundations of the building. A number of conferences were held and it was finally decided that because of the subsurface conditions, which had not been anticipated by anyone, the building could not be constructed within the lines of the original site and that its location would have to be changed so as to avoid the conditions encountered and prevent the large increase in costs of construction which would otherwise be necessary. Following the test excavations and the conferences, the contracting officer moved the location of practically the entire building. New plans and drawings were prepared and excavation for foundations of the building on the new location was commenced August 9, 1932.

Following the making of new plans and the relocation of the hospital building, the contracting officer issued certain written orders changing the contract for general construction and, under articles 4 and 3 of that contract, made an equitable adjustment in the amount due under the contract due to the conditions encountered which resulted in a net increase of $103,489.49 in the contract price covering the general construction work. He also made an extension of time of 212 days to August 14, 1933 for completion of the building. The largest item in the equitable adjustments in price under the contract was $68,360.57 for costs, due to "extra work and delay," made necessary by the changed conditions encountered.

6. During the period from June 6 to August 6, 1932, while the general construction work was under suspension, plaintiff and the defendant's general contractor conferred with the contracting officer and other officials of the defendant. As a result of these conferences the contracting officer decided that work under the changed plans and at the new location should proceed forthwith regardless of approaching winter weather. At that conference plaintiff protested to the contracting officer that it should not be required to proceed with the work called for by its contract without extra compensation under conditions which would be en-

countered, different from conditions of performance as contemplated by its contract, and insisted that an equitable adjustment be made by the contracting officer under articles 4 and 3 of its contract increasing its contract price so as to meet the increased cost due to delay and the new conditions under which the work would have to be performed, i. e. during winter weather of 1932–1933 when the building would not be under cover and enclosed. But the contracting officer held and advised plaintiff that as no actual construction work had been performed by it under its contract up to that time no adjustment in the contract price by way of extra allowances could be awarded and that plaintiff would either have to give up its contract and forfeit its bond or complete the work as called for under its contract as the building was made ready therefor, and make claim in the United States Court of Claims for any excess costs incurred.

7. By October 8, 1932, the defendant through the contractor for general construction had completed the foundation footings and, on that date, directed its general contractor to commence pouring concrete for the building structure. On that date plaintiff for the first time was able to commence work under its contract. For a time thereafter the only work which plaintiff could perform was that of locating and placing pipe sleeves and outlets. The work of actually installing the plumbing and heating equipment followed later, when building construction had sufficiently progressed for that purpose. The hospital building under construction except for the delay from June 4 to October 8, 1932, for which plaintiff was in no wise responsible, would have been under roof and generally enclosed before the beginning of cold and winter weather in 1932–1933. Seventy-five percent of the work to be performed by plaintiff under its contract was such as could be done along with the early general construction work as contemplated by the contract, before the building was under roof and generally enclosed. This work therefore could have been completed prior to winter weather had there been no delay in the work of constructing the building. The months of October and November 1932 were cold with some freezing weather, par-

ticularly in the latter month, and there was practically continuous freezing and sub-freezing weather during December 1932 and the months of January, February, March and early April 1933. The efficiency of plaintiff's mechanics and laborers engaged in plumbing and heating work was reduced 50 percent by reason of having to perform the work in freezing and near-freezing weather in the cold and winter months rather than in the summer and fall months as originally contemplated by plaintiff's contract, which would have been the case had the delay above-mentioned not occurred. The lowered efficiency of plaintiff's workmen, due to the changed conditions under which it was necessary to perform the work, resulted in additional labor costs to plaintiff of $5,192.49. The salary of plaintiff's superintendent on the job during the period of delay prior to October 8, 1932, of 126 days, was $1,170. During this period it was necessary for plaintiff to have his superintendent at the site of the work. During this delay period of 126 days plaintiff's actual overhead expense, exclusive of profit and the salary of its superintendent, was $2,987.46. The total of extra costs mentioned is $9,349.95.

8. The general construction work on the hospital building and the plumbing, heating, and electrical work called for by plaintiff's contract to be installed therein were completed and accepted by the defendant October 1, 1933. This represented a delay of 48 days from August 14, 1933, the date to which the contracting officer had previously extended the original period of 250 days for completion, due to the changed conditions as hereinbefore mentioned. During this period of 48 days, plaintiff's expense for wages of its superintendent and foremen, in excess of the amount of such wages over a 250-day period, and for overhead was $3,073.08.

As to this delay in completion of the contract for general construction and plaintiff's contract, the defendant's contracting officer held upon substantial evidence before him that both the general contractor and the plaintiff had contributed thereto and found as a fact, among others, that delay of the general contractor was caused by plaintiff in the performance of the plumbing, heating, and electrical work under its contract with the Government and that the

delay of plaintiff was caused by the general construction work which was being performed by the defendant under the general construction contract—thus constituting a delay due to unforeseeable causes beyond the control and without the fault or negligence of either contractor. In other words, the contracting officer found that each of the contractors had delayed the other during this 48-day period and he did not undertake to apportion the delay between them. His decision in this regard was not arbitrary or grossly erroneous. The contracting officer's final decision as to the delay to the contractor for general construction was made October 18, 1933, and his decision as to the delay to plaintiff was made on October 21, 1933.

9. As a result of the changed location of the hospital building, the contracting officer from time to time during performance of plaintiff's contract issued various orders for changes or extras under articles 3 and 5 of plaintiff's contract, the total of which resulted in a net reduction of $1,121.18 in plaintiff's contract price from $89,500 to $88,-378.82. Certain minor defects which developed during the guarantee period under plaintiff's contract were corrected by the contracting officer at an expense of $559.64, further reducing plaintiff's original contract price to $87,819.18. Plaintiff was paid and has received from the defendant the last-mentioned amount of $87,819.18.

10. The actual cost to plaintiff of performing its contract, including overhead, plus profit at the rate of 8.5 percent on the original estimated cost of performing the plumbing, heating, and electrical work was $114,423.46, which is $26,-044.64 in excess of the amended contract price of $88,378.82.

The court decided that the plaintiff was entitled to recover.

Littleton, *Judge*, delivered the opinion of the court:

The D. C. Engineering Co., Inc., herein referred to as plaintiff, seeks to recover $26,044.64, representing its total excess cost of performance of work called for by its contract over the amended contract price of $88,378.82.

Plaintiff takes the position, in substance, that the whole of this excess cost resulted from and was attributable to

an initial delay of 212 days and a subsequent additional delay of 48 days in defendant's general construction operations; that the 126 days' delay of the initial delay of 212 days was the result of failure of the defendant to have the general construction work ready for plaintiff's work within a reasonable time after receipt by plaintiff of notice to proceed, and that the 48 days' delay at the end of the contract, beyond the original fixed period of 250 days as extended to August 14, 1933, was likewise due to failure of defendant to have the construction work sufficiently advanced to enable plaintiff to complete its work that much earlier and at less cost. The building constructed by defendant under a separate contract was completed 260 days late. Plaintiff therefore contends that this delay of the defendant made it impossible for plaintiff to proceed properly and satisfactorily so as to complete its work in the period and under the circumstances contemplated by its contract; that the delay was unreasonable in that it required plaintiff to perform its work under unanticipated conditions and circumstances which rendered the work more expensive than it otherwise would have been had it been performed as contemplated by both parties to the contract, and that the defendant is liable for the total extra cost of performance.

Plaintiff relies chiefly upon the opinion of this court in *M. H. McCloskey, Jr., Inc.* to the *Use* of *U. S. Fidelity and Guaranty Co.* v. *United States*, 66 C. Cls. 105, but the principle there applied upon the facts disclosed by the record is not altogether applicable here. In that case the facts showed that the Government simply failed to fulfill within a reasonable time its contract obligation to prepare and furnish the McCloskey Company the site upon which it was to perform the work called for by its contract. We do not find that case to be authority for allowance of the full amount of the loss claimed in this case. The amount, if any, recoverable in each case depends upon proof as to the nature and extent of and responsibility for the delay or conditions giving rise to excess performance costs, and the amount of such costs as are attributable to such delay or conditions under which it became necessary for the work to be performed.

Under the facts disclosed by the record in this case, the provisions of plaintiff's contract, the representations of the contracting officer as to the period during which the general construction work would be performed, and the statements and representations in the specifications and drawings relating to all work upon the entire project, upon all of which plaintiff had a right to rely and did rely in making its bid, we are of opinion that plaintiff is entitled to recover $9,349.95 of the total excess cost of $26,044.64 incurred. *United States* v. *Smith*, 94 U. S. 214, 217; *Mueller* v. *United States*, 113 U. S. 153, 156; *Dermott* v. *Jones*, 23 How. 220, 231, 233; *O'Brien* v. *Miller*, 168 U. S. 287, 297; *Green County, Ky.* v. *Quinlan*, 211 U. S. 582, 594; *American Surety Co.* v. *Pauly (No. 1)*, 170 U. S. 133, 144; *United States* v. *Spearin*, 248 U. S. 132; *Wood* v. *Fort Wayne*, 119 U. S. 312, 321, 322; *H. E. Crook Co., Inc.*, v. *United States* (B–195), 59 C. Cls. 593.

Time was an essence of plaintiff's contract with the defendant and nowhere in plaintiff's contract or specifications or in defendant's contract and specifications for construction of the building in which plaintiff was to perform its work was the defendant relieved of responsibility for or liability to plaintiff for excess costs by reason of delay for which plaintiff was in no way responsible. Par. 1 of plaintiff's specifications 1H–1 specifically directed plaintiff's attention to the specifications and bid form for construction of the building in which the mechanical equipment was to be installed. While it is true that in the invitation for bids and the specifications for plumbing, heating, and electrical work it was stated by defendant that this work would be required to be commenced promptly after date of receipt of notice to proceed and be completed at a date not later than that fixed by the defendant in the contract which was to be made for construction of the hospital building, the representations made were definite enough to fix the rights and liabilities of plaintiff and defendant in the event of a material deviation or change in the represented conditions or the period of performance giving rise to an increase or decrease in cost of performance. The period in which construction of the building would be commenced and completed was definitely

fixed by the defendant on April 21, 1932, and plaintiff's contract making that period of 250 days the period within which the plumbing, heating, and electrical work should be completed was executed April 29, 1932. On May 12, 1932, the defendant gave plaintiff written notice to proceed stating that it would be required to complete the work called for by its contract at a date not later than 250 calendar days after May 9, 1932, or by January 14, 1933. Before making its bid for furnishing and installing the plumbing, heating, and electrical equipment in the building to be constructed by defendant, plaintiff was advised by the contracting officer for the defendant, who had charge of all work connected with the entire project, that the work of constructing the building in which this equipment was to be installed would commence in the early spring of 1932 as soon as weather conditions permitted so that the building would be under roof and enclosed before cold weather set in during the following months. Nowhere in the invitation for bids, the specifications, or the standard form of contract, upon all of which, together with the representation of the defendant's authorized contracting officer, the plaintiff made its bid, is there to be found any provision, express or implied, that the Government was not to be responsible for or liable to plaintiff for excess cost or damage resulting from and attributable to delay in the work to be performed by defendant of constructing the building. For this reason the cases of *Wood et al* v. *United States*, 258 U. S. 120; *H. E. Crook Co., Inc.* v. *United States*, 270 U. S. 4; *G & H Heating Co.* v. *United States*, 63 C. Cls. 164; *Gertner* v. *United States*, 76 C. Cls. 643, all of which involved materially different facts, circumstances, and contract provisions, are not in point here. See *Cotton et al* v. *United States*, 38 C. Cls. 536, 548; *Hyde* v. *United States*, 38 C. Cls. 649; *Miller* v. *United States*, 49 C. Cls. 276, 282, 283; *Edge Moor Iron Co.* v. *United States*, 61 C. Cls. 392, 396; *Carroll et al* v. *United States*, 76 C. Cls. 103.

Plaintiff's contract and specifications did not contain a provision that the price set forth in the contract should cover all expenses of every nature connected with the work to be done and that the Government was to be relieved

of any liability if the building structure was not furnished as contemplated and stated, so that plaintiff could proceed with and perform its work during the time and under the conditions contemplated by both parties without incurring excess costs by reason of delay in construction operations. And we think it may not be said in this case that the parties to the contract here involved understood that the Government was to be relieved of all responsibility for any excess costs by reason of plaintiff having to perform the work called for by its contract under circumstances and conditions differing materially from those contemplated therein. *Globe Refining Company* v. *Landa Cotton Oil Company*, 190 U. S. 540, 543. The fact that a condition encountered, which causes delay, is unforeseen or unanticipated does not render the delay unavoidable and is not enough to relieve the contracting party, whose contractual duty it is to overcome it, from responsibility for damages to the other party from the delay caused by such condition. *Carnegie Steel Co.* v. *United States*, 49 C. Cls. 403, affirmed 240 U. S. 156. We are of opinion that plaintiff's contract and specifications as a whole, and particularly articles 4 and 13, when considered in connection with the Government's statements and representations set forth in the specifications relating to construction of the hospital building, require the conclusion that the Government was not relieved of responsibility for such of plaintiff's excess costs as did not result from a cause for which plaintiff was responsible and which plaintiff was not required, in making its bid, to take into consideration.

In the specifications and drawings supplied to all bidders, the Government showed and indicated the conditions under which the work with which all parties were directly or indirectly concerned would be performed. In these specifications and drawings and in art. 4 of the standard form of contract the Government, in effect, represented to all bidders, including plaintiff, that in making their bids they should not take into consideration costs or expense of performance by reason of delay or extra work which might result from discovery by the Government of subsurface or latent conditions at the site of the work materially differing from those shown on the drawings or indicated in the specifi-

cations; and that if such changed conditions should be encountered, the Government, through its contracting officer, would make an equitable adjustment in the amount due under the contract and in the time required for its performance so as to take care of any increase or decrease in the cost of performance resulting from such changed conditions. We think, in the circumstances, the fact that the Government encountered and discovered conditions materially differing from those contemplated and shown in its drawings and specifications in connection with its work of constructing the building in which plaintiff was to perform its work did not relieve the defendant of the duty, under plaintiff's contract, of making an equitable adjustment so as to increase the amount due under plaintiff's contract to take care of plaintiff's increased cost of performance resulting from and attributable to such changed conditions. Plaintiff had been notified prior to June 4, 1932, that the construction work would be ready for plaintiff to begin its work by that date. Plaintiff immediately shipped all its tools and several carloads of material to the site, and employed a superintendent and sent him to the job. The contracting officer ordered the construction work stopped for a period of sixty-five (65) days, and finally moved the location of the building. This delayed the construction of the foundations five months and twenty-four days. During this time plaintiff could do no work, although it had to keep its superintendent on the job and its overhead expense was accruing. Plaintiff timely protested to the contracting officer that it should not be required to proceed with the work called for by its contract at the price stated therein by reason of the delay and under the circumstances and condition which had arisen, and insisted that the contracting officer should make an equitable adjustment increasing the amount otherwise due under its contract so as to meet the new and changed conditions which had been and would be encountered in its performance. The contracting officer, while not denying the claimed effect upon plaintiff's performance, refused to make any adjustment and, in so refusing, we think he failed to perform the duty required of him under art. 4 of the contract. It should be noted here that the contracting officer did make an adjustment in

plaintiff's contract in favor of the Government of a net decrease of $1,121 in the amount due under plaintiff's contract by reason of the elimination of certain work because of the changed conditions encountered which necessitated the relocation of the building. It seems obvious that the adjustment, in order to be equitable as contemplated in the contract, should have taken into consideration as well the then known and clearly contemplated increased performance costs of plaintiff by reason of the same conditions. The changed conditions affected plaintiff's performance and costs in much the same way as they affected the performance and costs of the defendant's construction contractor, but in a lesser degree. Nevertheless, the plaintiff got nothing for its increased costs and the construction contractor was given an increase of $68,360.57 as an equitable adjustment "for extra work and delay" due to the changed conditions encountered.

In these circumstances and for the reasons hereinbefore stated, it becomes the duty of the court to determine and allow plaintiff the amount which will compensate it for the excess costs incurred and paid by it by reason of delay in performance of the work under conditions which rendered it more expensive than it otherwise would have been. We have found from the evidence submitted that this excess cost is $9,349.95, made up of superintendent's salary and agreed overhead expense from June 4, 1932, the date on which plaintiff had been notified it could begin its work, to October 8, 1932, the date on which the building construction work was first ready for commencement by plaintiff of its work, and increased labor costs resulting from inefficiency of laborers who had to perform their work in the open, during the cold and winter weather of 1932–1933, rather than in an enclosed building as originally contemplated by the parties to the contract.

With reference to the further excess costs amounting to $3,073.08, representing wages of the superintendent and foremen, and overhead expense for the delay period of 48 days after the extended date of August 14, 1933, for completion, the evidence shows and the defendant's contracting officer found that plaintiff was as much responsible for this delay as was the defendant's contractor for the general construction

and, therefore, extended the time for each of the contractors from August 14 to October 1, 1933. Plaintiff is therefore not entitled to recover this cost.

The balance of $13,621.61 of the total loss of $26,044.64 sustained by plaintiff under its contract appears from the evidence of record to have been the result of inadequate estimates by plaintiff for costs of direct labor and materials for heating and plumbing and its inability, due to its financial condition, to take advantage of certain discounts for prompt payments on materials purchased and installed in the building. We need not determine whether under all the circumstances the plaintiff would be entitled to recover on account of loss of discounts for the reason that the proof does not show the exact amount which plaintiff was required to pay for materials, by reason of its inability to take advantage of allowable discounts through prompt payments for materials purchased. In these circumstances, this portion of the total excess cost of $26,044.64 is clearly not recoverable.

Judgment will be entered in favor of plaintiff for $9,349.95. It is so ordered.

Green, *Judge*, concurring:

I concur in the opinion of Judge Littleton but wish to add some observations on the case.

The defense of the defendant as set forth in its brief seems to be based largely upon the fact that the construction of the building itself was let by the defendant to another contractor and that the defendant consequently was not responsible for any delays in its erection. I think the opinion of Judge Littleton shows very clearly that this is no defense under the circumstances of the case and that the authorities cited by defendant's counsel are not applicable to the situation which we have before us. I would, however, go farther than this.

As the stoppage of the work was caused by the orders of the defendant's authorized agent, the construction officer, the defendant was directly responsible for the stoppage and the consequences which followed from it. Plaintiff's contract with defendant fixed a time for the completion of the building and the work of plaintiff. After the contract had

been entered into, the defendant, through its construction officer, by written notice, called plaintiff's[1] attention to this requirement. The time for completion was one of the specifications of the contract and there is always an implied warranty that the specifications are adequate for the work to be done. See *United States* v. *Spearin*, 248 U. S. 132, 136, where this rule is laid down. When the defendant ordered the work stopped, and continued its stoppage for the period stated in Judge Littleton's opinion, it obviously changed the contract and by this breach became liable for the damage caused to plaintiff by this act. But if the defendant be not held directly liable, it is clearly liable under Articles 3 and 4.

It makes no difference, however, in the *amount* of plaintiff's recovery whether the defendant be held liable directly for the stoppage, or be held liable under Articles 3 and 4 of the contract.

Plaintiff's contract provided in substance in Article 3 that the contracting officer might make changes in the drawings and specifications of the contract within the general scope thereof, and also provided in substance in Article 4 that if the Government discovered in the progress of the work subsurface conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the contracting officer could make such changes in the drawings and specifications as he might find necessary. But if it should be held that these provisions authorized the change in the contract which the contracting officer made, they do not relieve the defendant of responsibility, for the same articles also provided in substance that in the event the contracting officer should make a change in accordance therewith which increased the cost of the work or the time of its performance, that an equitable adjustment should be made with the contractor. The contracting officer did make an equitable adjustment with the building construction contractor increasing the price for building construction work in the amount of $68,360.50 for extra work and delay, but refused to make any adjustment with the plaintiff for increased costs notwithstanding plaintiff's

[1] The word "plaintiff" is used in this opinion as referring to either plaintiffs' predecessor or the nominal plaintiffs in the case.

objections and protests against his action and stated in substance that no adjustment could be made under the contract as no actual construction work had been performed by the plaintiff at the time the change was made. This decision was erroneous. If either Articles 3 or 4 are applicable under the facts in the case, the refusal of the contracting officer to make an adjustment was a violation of the contract and made the defendant liable to plaintiff for the injury or damage done by the change made. The measure of plaintiff's recovery would then be the same as it would be if plaintiff was held directly liable for the stoppage of the work.

It has been urged as a defense to plaintiff's action that the change made was not the fault of anyone but simply resulted from unforeseen conditions. I am of the opinion that the fact that the change made was necessary and that the cause thereof was unforeseen is no defense even if it should be held that it was not the fault of anyone that the defects in the site were not discovered earlier. See *United States* v. *Thomas*, 15 Wall. 337, 339, 348.

In my view, the defendant breached the contract in changing it to the injury and damage of plaintiff at a time when plaintiff was ready to perform it and would, if permitted, have completed it in accordance with the terms to which the parties had agreed. This is sufficient to entitle the plaintiff to recover.

WHALEY, *Chief Justice:* I concur in the part of this opinion which holds that plaintiff is entitled to actual damages resulting from the stoppage of work by order of the defendant. I do not believe Articles 3 and 4 have any application.

JONES, *Judge*, concurs in this statement.

MADDEN, *Judge*, dissenting:

I do not agree with the opinion of the Court. In my discussion I shall use the word "plaintiff" to refer either to the receivers who are here suing as such, or to the contractor who made the contract and did the work. The context will show which is meant.

Plaintiffs' theory of recovery is stated in their reply brief as follows:

> * * * Plaintiffs' claim is predicated upon a delay of 212 days caused by the Government, resulting primarily from the discovery of faulty foundations which necessitated the drawing of new plans and complete relocation of the Hospital building.

There is no claim that anyone was at fault in failing to discover sooner the faulty foundations, but it is plaintiffs' position that the delay resulting therefrom, which made the cost of performance greater than had been expected, was a breach of contract on the part of the defendant, entitling plaintiffs to recover the additional cost. Ordinarily, the fact that the performance of one of the parties to a contract is made more difficult or expensive by supervening circumstances does not excuse him from performing. See 6 Williston, Contracts, sec. 1963, p. 5507; *Maryland Dredging Co.* v. *United States*, 47 C. Cls. 557. Nor does it entitle him to additional compensation. *Day* v. *United States*, 245 U. S. 159.

Plaintiffs' claim then depends upon whether there is anything in the contract here involved to take it out of the general rule. The question should be, not as the majority opinion states, whether under the terms of the contract "the defendant was relieved of responsibility for or liability to plaintiff for excess costs by reason of delay for which plaintiff was in no way responsible", but whether under the terms of the contract, the defendant should be held to have assumed responsibility to compensate plaintiff for excess costs due to delay which was no one's fault.

The defendant did not agree to have the building ready for the contractor who was to install the plumbing, heating and wiring at any fixed time, and from the specifications and contract, plaintiff must have known that its time of performance was dependent upon the progress of the building contractor. The specifications clearly directed its attention to the contract for general construction and advised it that its contract was to be performed in harmony with the other work on the building. Article 1 of the contract provided that the work under it was to be completed "at a date

not later than that provided for in the contract for General Construction", but there was no promise on the part of the defendant as to when that date would be. Plaintiff must have known that the government reserved the power to make changes in the builder's contract, as well as in its own, and that exercise of that power would necessarily cause delay. Cf. *H. E. Crook Co.* v. *United States*, 270 U. S. 4; *Gertner, Sr.*, v. *United States*, 76 C. Cls. 643.

Article 4 of the contract provided that if the government should discover, or the contractor encounter, unexpected conditions at the site materially differing from those shown in the drawings and specifications, the contracting officer should make the necessary changes in the plans and any necessary changes in the amount of compensation and time for performance. This provision seems to me to have reference only to the contractor whose work is directly affected by the discovery of the unexpected condition. Nor does plaintiff appear to have understood the provision in any other sense, for no reliance is placed on article 4 in its briefs. If plaintiff had made its contract under such circumstances that it and the agents of the government expected that the work would be done in the winter, plaintiff and other bidders would have estimated for a high labor cost. If, then, the building contractor had been delayed due to unforeseen conditions, so that plaintiff's work was done in the summer, it would have profited accordingly and the defendant could not, under the contract, have denied it that profit. I think this risk of gain or loss is not removed by article 4, except as to the contractor who actually encounters the unforeseen condition.

The statement of the contracting officer to plaintiff that construction would begin in early spring so that the building would be under roof before cold weather set in appears to have been a truthful statement of a reasonable expectation at the time he spoke, but hardly a promise on the part of the government that what he said would be accomplished, regardless of intervening circumstances or events.

The provision in article 9 of the contract that the contractor's right to proceed to perform the contract and to be paid without the deduction of liquidated damages for delay

should not be prejudiced by delays due to "unforeseeable causes beyond the control and without the fault or negligence of the contractor" seems to show that neither party was to be charged with breach of contract merely for delays due to such causes. Plaintiff was, as it should have been, granted an extension of time and excused from liquidated damages. That was all that it was entitled to under its contract.

HENRY ROBERTS AGNE v. THE UNITED STATES

[No. 42475. Decided December 1, 1941]

On the Proofs

Income tax; proceeds of stock sale in cash and notes as taxable income.—Where plaintiff in 1922 owned 20 shares of the capital stock of a corporation and was the sole beneficiary of a trust, under his father's will, which owned 122 shares of said stock; and where said shares, along with the balance of the majority stock of said corporation were sold in 1922 at a price in excess of the income tax base value of said shares; and where the purchase price of said majority stock was paid partly in cash and partly in notes, and distribution of the cash was made proportionately to plaintiff and said trust and the other majority stockholders; and where the transaction became involved in litigation instituted by minority stockholders, such litigation resulting adversely to plaintiff and the other majority stockholders, including said trust, and where in said litigation judgments were obtained against, and subsequently paid by, plaintiff and said trust; it is *held* that the proceeds of said sale, in cash and notes, constituted income for tax purposes in said year.

Same; warranties and covenants in contract of sale.—Where taxpayer made returns for the year 1922 on a cash basis; and where the sale of stock made in that year was pursuant to a contract, executed in 1922, which contained warranties with respect to the financial condition of the corporation and covenant binding the seller not to engage in competition with buyer, as well as certain obligations with respect to income taxes of said corporation; it is *held* that such warranties and covenants did not keep the transaction inchoate and accordingly said sale was a completed sale in 1922.

Same; "readily realizable market value" of notes.—Where in the sale of said majority stock, for cash and notes, said cash and notes in 1922 came into the hands of the agent, or trustee, for said majority stockholders; and where only the cash was

distributed to said stockholders, including plaintiff and the trust of which plaintiff was sole beneficiary; it is *held* that said notes had a "readily realizable market value" within the meaning of section 202 (a) (3) (c) of the Revenue Act of 1921 and the pertinent Treasury Regulations, and constituted taxable income to plaintiff for his proportionate share, including his proportionate share of the notes in the hands of his agent or trustee.

Same; postponement of liability by litigation.—Where the right of plaintiff, as well as the right of other majority stockholders, including the trust of which plaintiff was the sole beneficiary, to retain all the proceeds of the sale of their stock was attacked in litigation beginning in 1922, and was concluded adversely to them some years later; it is *held* that, under the authorities, this fact did not postpone plaintiff's tax liability until the outcome of said litigation was known. *North American Oil Consolidated* v. *Burnett*, 286 U. S. 417, cited. See also *McDuffie, Trustee*, v. *United States*, 85 C. Cls. 212; *Schramm* v. *United States*, 93 C. Cls. 181.

The Reporter's statement of the case:

Mr. Preston B. Kavanagh for plaintiff.

Mr. J. A. Rees, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows upon a stipulation of the parties:

1. Plaintiff is, and at all times material herein was, a resident of the city of Utica, State of New York. This case involves a consideration of his income taxes for the year 1922.

2. At the beginning of the year 1922, plaintiff was the owner of twenty shares of the capital stock of the Utica Sunday Tribune Company, a New York corporation, engaged in publishing a daily newspaper in the city of Utica, New York. At the same time plaintiff was beneficiary of a trust created by the following provisions of the will of his father, Jacob Agne, who died in 1918:

> Fourth. In case my said son shall not have attained the age of 30 years at the time of my decease, then and in that event, I give, devise and bequeath all said rest, residue and remainder of my property to the trustees hereinafter named in trust to invest the same and to

keep the same invested, to collect and receive the rents, issues, and profits therefrom and to pay the rents, issues, and profits therefrom to my said son Henry Roberts Agne until he shall arrive at the age of 30 years; said rest, residue and remainder with its accumulation of interest, if any, shall become the absolute property of my said son when he shall have attained the age of 30 years.

The trustees of this trust were Amelia Agne, plaintiff's aunt, and John C. Fulmer, plaintiff's uncle by marriage. Among the trust assets were 122 shares of the capital stock of the Utica Sunday Tribune Company. The stock of the Utica Sunday Tribune Company owned by the trust had a basis for computing gain or loss upon a sale at the rate of $225.00 per share, and the stock owned by plaintiff had a basis of $288.76 per share.

3. The total outstanding capital stock of the Utica Sunday Tribune Company at the beginning of 1922 was 600 shares, held by thirteen stockholders. These stockholders were divided into a "majority" group and a "minority" group, made up of the following persons:

Majority Group

John C. Fulmer	156 shares
Hattie C. Fulmer (wife of John)	5 "
Amelia Agne (sister of Hattie)	4 "
Henry Roberts Agne (plaintiff, nephew of Hattie and Amelia)	20 "
Estate of Jacob Agne (father of plaintiff and brother of Hattie and Amelia)	122 "
Total	307 shares

Minority Group

Christian Sautter, Jr.	124 shares	
William H. Cloher	52 "	
Arthur Stappenbeck	46 "	
William I. Taber	20 "	
T. Harvey Ferris		
George W. Gammel	15 "	
John H. Siemers	13 "	
Carrie B. Sherman	7 "	
Total	293 shares	
Grand total		600 shares

4. John C. Fulmer, a member of the majority group of stockholders and a trustee of the estate of plaintiff's father, was president and treasurer of the Utica Sunday Tribune Company and in complete charge of its operation. The other members of the majority group relied upon his judgment in all matters respecting the Tribune Company and its stock.

5. During the early part of the year 1922, John C. Fulmer negotiated with a newspaper syndicate for the sale of the stock owned by the majority group. The syndicate, after extended negotiations, offered to purchase the entire 600 shares of stock of the Tribune Company for the sum of $425,000, payable partly in cash and partly in notes.

6. During the month of March 1922, Fulmer secured through agents an option from each member of the minority group of stockholders to purchase the stock of each at a price of $300.00 per share. He exercised these options on March 30, 1922, and acquired the entire minority interest of 293 shares of stock for the total sum of $87,900.00 in cash, or at the rate of $300.00 per share. In order to exercise these options, Fulmer borrowed $87,900.00 from a bank, using his Tribune Company stock as collateral. At the time these options were given and exercised, the members of the minority group understood that all of the stock of the Tribune Company was to be sold to an outside purchaser, and thought that both the majority and minority stock were to bring the same price.

7. On April 6, 1922, Fulmer delivered the 293 shares of minority group stock to the syndicate and received their check for $87,900.00, which he used to repay his bank loan of that amount. On the same day Fulmer entered into a written contract with the syndicate, whereby he agreed to sell and they to purchase the remaining 307 shares of Tribune Company stock for $337,100.00, or at the rate of $1,098.00 per share. This contract recited that Fulmer was acting for himself and as trustee for the remaining members of the majority group of stockholders. It also provided for certain warranties by the sellers of the financial condition of the Tribune Company and certain obligations with respect to its income taxes, and contained an agreement to refrain from competition in the newspaper business.

8. On April 17, 1922, Fulmer delivered to the purchasers the remaining 307 shares of stock of the Tribune Company and received, for himself, and as trustee for the other members of the majority group, the contract price of $337,100, partly in cash and partly in notes payable to him, as follows:

	Payments	Interest
Cash received April 17, 1922	$137,100.00	
Notes payable and paid in 1922	[1] 92,500.00	$5,652.50
Notes payable and paid in 1923	25,000.00	6,075.00
Notes payable and paid in 1924	82,500.00	2,475.00
	$337,100.00	$14,202.50

[1] Includes a mortgage of $45,000.00 accepted by Fulmer in part payment of one of the notes.

9. The total of Fulmer's receipts and his disbursements to plaintiff and others in connection with the sale of the Tribune Company stock were as follows (exclusive of all costs and expenses of litigation which ensued, as hereinafter described, and of judgments rendered as a result of litigation over the sale of the Tribune Company stock):

Receipts

Sale of minority stock		$87,900.00
Sale of majority stock		337,100.00
Interest on notes given in partial payment for majority stock		14,202.50
Tax refunds due Tribune Co. received 1924		1,923.55
Total receipts		441,126.05

Disbursements and Distribution

Paid minority stockholders, 1922		$87,900.00
Commission to newspaper brokers on sale Tribune Co. stock, paid April 19, 1922		10,927.50
Attorney's fee—sale Tribune Co. stock, paid April 19, 1922		10,927.50
Distributions to majority stockholders:		
Estate Jacob Agne:		
April 19, 1922	$45,797.21	
March 14, 1924	1,000.00	
June 2, 1924	3,500.00	
Oct. 1, 1924	16,372.47	
Oct. 27, 1924	13,000.00	
Aug. 3, 1925	1,081.24	
		80,750.92

Reporter's Statement of the Case

Distributions to majority stockholders—Continued.

Henry Roberts Agne (plaintiff):		
April 19, 1922	$7,508.22	
June 3, 1924	2,000.00	
Oct. 1, 1924	2,684.18	
		$12,192.40
Hattie C. Fulmer:		
April 19, 1922	1,877.34	1,877.34
Amelia Agne:		
April 19, 1922	1,501.64	
March 14, 1924	500.00	
Oct. 1, 1924	536.84	
		2,538.48
John C. Fulmer:		
April 19, 1922	58,560.59	
April 17, 1924	500.00	
May 8, 1924	14,500.00	
June 2, 1924	7,000.00	
June 25, 1924	1,000.00	
Aug. 1, 1924	1,000.00	
Sept. 2, 1924	1,500.00	
Oct. 27, 1924	20,935.36	
Nov. 11, 1924	4,000.00	
		108,995.95
Additional taxes of Tribune Co. paid Jan. 1, 1925		357.48
Fees and expenses in connection with Tribune Co. taxes paid Jan. 1, 1925		3,213.47
Set aside trust fund per court order in case of *Stappenbeck* v. *Fulmer, et al.*:		
July 10, 1922	12,875.00	
Jan. 9, 1925	38,646.10	
		51,521.10
Total disbursements and distributions		$371,202.14
Excess of receipts—to balance		69,923.91
		$441,126.05

The balance of $69.923.91 remaining after all disbursements and distributions, was on deposit in a bank account in the name of "John C. Fulmer, Individually and as Trustee," in which account all receipts in conection with the sale of the Tribune Company stock were originally de-

posited. The balance was withdrawn by Fulmer at some later date.

10. Shortly after the sale of the majority and minority stock of the Tribune Company, the individuals who had composed the minority group of stockholders of that company discovered that the sale of the majority stock had been at a price greatly in excess of that realized by the minority. The minority stockholders threatened suit and suits against the majority stockholders were acutally commenced in the trial division of the Supreme Court of New York State in the following order and upon the following dates:

Minority Stockholders:	*Date of Suit*
Christian Sautter, Jr.	May 4, 1922
William H. Cloher	May 4, 1922
Arthur Stappenbeck	July 5, 1922
Carrie B. Sherman	Aug. 28, 1924
William I. Taber	Sept. 11, 1926
T. Harvey Ferris	Sept. 11, 1926
George W. Gammel	Sept. 11, 1926
John H. Siemers	Sept. 11, 1926

The complaints in the several cases were substantially similar in that each charged the majority stockholders, and particularly John C. Fulmer, with a breach of fiduciary duty and prayed for an accounting and an equal division of the proceeds of the sale of the Tribune Company stock among all the stockholders of that company in proportion to their actual holdings. Carrie B. Sherman, one of the minority stockholders, sued John C. Fulmer alone and did not join plaintiff or any other member of the majority group.

11. The first of the cases brought by the minority stockholders, that of Arthur Stappenbeck, was tried in November 1922. Decision was rendered in 1923 in favor of Stappenbeck and the case was referred to a referee for an accounting. Defendants, the majority stockholders, appealed and carried the case to the Court of Appeals of New York where, with minor exceptions, it was affirmed (*Stappenbeck v. Fulmer*, 223 App. Div. 810, 227 N. Y. S. 909; 249 N. Y. 594, 164 N. E. 597). The referee found, and the court entered judgment on his findings, that each of the majority stock-

holders was liable to Stappenbeck for Stappenbeck's proportionate share of the total proceeds of the sale of the entire 600 shares of the stock of the Tribune Company, with compound interest on such share, less the payment theretofore made to Stappenbeck in 1922 at the rate of $300.00 per share. The cases of the minority stockholders other than Stappenbeck were tried together, beginning in June 1929, and in each case judgment was given for the complaining stockholder and the case referred to a referee for an accounting. The second referee followed substantially the findings of the referee in the Stappenbeck case except that defendants other than Fulmer were held accountable only to the extent that their proportionate interest in the stock warranted. Fulmer, having been the prime mover and active participant in the sale of the stock, was held liable for the full amount found to be due each of the minority stockholders. Judgments were entered accordingly, appealed from by defendants and finally affirmed. The Stappenbeck judgment became final in 1927 and the other judgments in 1932.

12. Plaintiff reached the age of 30 years in 1925 and received distribution of the remaining assets of the trust created under the will of his father and was thereafter liable for the payment of any judgments entered against the trustees of the trust in the suits brought by the minority stockholders of the Tribune Company. Judgments in favor of the minority stockholders were entered against plaintiff and the estate of Jacob Agne in the amount of $124,331.90, exclusive of court costs. Judgments for court costs entered against plaintiff and the estate of Jacob Agne totaled $5,087.53. Between December 8, 1928, and March 19, 1935, plaintiff paid the sum of $91,840.74 upon the judgments entered in favor of the minority stockholders against him and the estate of Jacob Agne. Of this amount, $75,528.35 was paid to reduce the judgments, and $16,312.39 was paid upon accrued interest on the judgments. In addition, plaintiff, between December 8, 1928, and February 17, 1934, paid court costs and interest thereon amounting to $3,635.05. Expenses for attorney's fees and other costs of litigation were paid by plaintiff in the amount of $15,413.57.

13. In addition to the payments made by plaintiff, as stated in the preceding finding, he suffered a loss of approximately $75,000.00 by reason of loss in value of certain assets conveyed by him in trust in 1930 to secure payments of any judgments which the minority stockholders might thereafter finally secure. The trust assets were liquidated in 1935 at a substantial loss and the balance remaining was applied upon the judgments. Plaintiff, since 1935, has been without funds to make further payments upon the judgments and accrued interest still outstanding against him and the estate of Jacob Agne. As shown in finding 9, the sums received by plaintiff, individually and through the estate of Jacob Agne, from the sale of Tribune Company stock, amounted in all to the sum of $92,943.32, of which $53,305.43 was received by plaintiff and the estate of Jacob Agne in the year 1922.

14. On March 12, 1923, plaintiff filed with the Collector of Internal Revenue for his district an individual income tax return, upon the basis of cash receipts and disbursements, for the calendar year 1922 and reported thereon a total income of $7,151.24 and deductions therefrom, amounting to $171.89, leaving a total taxable net income of $6,979.35, upon which there was reported a total income tax liability of $164.90, which sum was paid with the filing of the return on March 12, 1923.

Schedule D entitled "Capital Net Gain from Sale of Assets Held for More Than Two Years" of plaintiff's return contained the following reference: "See statement attached." Appended to that return was a typewritten sheet reading as follows:

> In 1922 I sold twenty shares of stock in the Utica Sunday Tribune Company, a corporation, pursuant to a contract of sale containing a number of guarantees which may result in payments which I will have to make and which, at this time, are not determined as to amount.
>
> I, together with John C. Fulmer, Hattie C. Fulmer, Amelia Agne, and Estate of Jacob Agne owned the controlling interest in said corporation and in connection with the above sale I received $21,962.07, partly in cash and partly in notes running over a period of 4½

years. The minority stockholders sold their stock to the same purchasers and thereafter three of the minority (there were eight in all) brought actions in the Supreme Court against me for damages on the ground of fraud and deceit in connection with the stock sale. Other suits are threatened. All of the actions are undetermined at this time, one was tried in the Supreme Court in November, 1922, but no decision has, as yet, been rendered. It is impossible for me at this time to determine what my net gain or loss will be from the transaction owing, partly to the fact that the suits are undetermined, and partly to the fact that I do not know at present what my expenses in the litigation will be. A statement at this time as to the transaction arriving at a gain or loss would be entirely guesswork. As soon as these matters are determined I will request permission to file an amended return for the year 1922.

The trustees of the trust created by the will of Jacob Agne also filed a timely return for the calendar year 1922, showing the receipts and disbursements of the trust. All net income thereof was distributed within the year to plaintiff, including the total amounts received by the trust in that year from the sale of 122 shares of capital stock of the Tribune Company. Appended to the return of the trustees was a statement dealing with the sale of the Tribune Company stock, in all respects similar to that attached to the return of plaintiff and above quoted.

15. The Commissioner of Internal Revenue took the position that plaintiff was taxable in the year 1922 upon a profit derived from the sale of the shares of Tribune Company stock owned by him and by the trust created under the will of Jacob Agne, measured by the difference between the total contract price for the stock, less certain discounts for notes maturing after 1922 and certain expenses, and the basis of the stock in the hands of plaintiff and the trust. Pursuant to this determination, the Commissioner made a timely assessment against plaintiff of additional taxes for the calendar year 1922 in the amount of $9,599.20 on a list dated September 10, 1927, and this sum, together with accrued interest, amounting in all to $13,372.66 was, after due notice and demand, paid by plaintiff to the Collector of Internal Revenue on July 17, 1928. On November 27, 1928,

plaintiff filed with the Collector of Internal Revenue a formal claim for refund of $13,372.66 so assessed and paid. This claim stated as grounds, among others, in substance, that no part of the proceeds from the sale of 142 shares of Tribune Company stock constituted gross income to plaintiff for the year 1922, and in the alternative, that only so much of the proceeds as were actually received by him in 1922 could constitute gross income to him in that year. The claim was rejected by the Commissioner on a schedule dated August 16, 1929, and plaintiff was duly advised of this action.

The court decided that the plaintiff was not entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

Plaintiff in 1922 owned 20 shares of the capital stock of the Utica Sunday Tribune Company, a corporation publishing a daily newspaper in Utica, New York. A trust under the will of his father, Jacob Agne, of which trust plaintiff was the sole beneficiary, owned 122 shares of the same stock. The income tax base value of plaintiff's 20 shares was $288.76 per share and of the 122 shares in the trust was $225 per share.

Trustees of the trust were plaintiff's uncle by marriage, John C. Fulmer, and plaintiff's aunt, Amelia Agne. Fulmer was the largest individual stockholder in the Tribune Company. Plaintiff and other members of his family relied upon Fulmer's judgment in all matters respecting the Tribune Company and its stock. The family group, which included Fulmer, the estate of plaintiff's father, and plaintiff and his two aunts, owned a majority of the Tribune Company stock, 307 out of 600 shares. The balance of 293 shares was owned by eight individuals, who composed a minority group.

Early in 1922 Fulmer negotiated a deal whereby an outside purchaser offered to purchase the entire 600 shares of the Tribune Company stock for $425,000. Fulmer then bought the 293 minority shares at $300 per share and turned them over to that purchaser. At the same time he con-

tracted with the purchaser to sell the remaining 307 shares for $337,100, or $1,098 per share. In this contract Fulmer was described as acting for himself and as trustee for the other members of his family, the majority group. The contract contained certain warranties with respect to the financial condition of the Tribune Company, certain obligations assumed by the sellers with respect to the Company's income taxes, and covenants binding the majority group not to engage in competition with the purchaser.

At the time Fulmer purchased the 293 shares of minority stock for resale, the owners of that stock understood that all the stock of the Tribune Company was to be sold, but they did not know that the stock owned by the majority group was to bring a higher price than $300 per share and they supposed that both the majority and minority shares were to sell for the same price.

April 17, 1922, Fulmer consummated the sale of the 307 shares of the majority stock and received the purchase price in cash and notes payable to him and paid to him when due, as follows:

Cash	$137, 100. 00
Notes payable and paid in 1922	92, 500. 00
Notes payable and paid in 1923	25, 000. 00
Notes payable and paid in 1924	82, 500. 00

The cash payment and the payments on the notes were deposited by Fulmer in a bank account in the name of "John C. Fulmer, Individually and as Trustee." On April 19, 1922, Fulmer distributed $137,100 from the account. Plaintiff received $7,508.22 and the trust under the will of plaintiff's father received $45,797.21, which it passed over to plaintiff in 1922, who thereby received a total of $53,305.43 in that year from the sale of the Tribune stock. The purchase money notes were paid to Fulmer as they fell due, and distributions were made by him in 1924 and 1925 to plaintiff and to the trust, which in turn distributed to plaintiff. The total amount received by plaintiff, including the amounts received in 1922, was $92,943.42. The trust terminated in 1925 and made complete distribution of its assets to plaintiff.

Shortly after the sales of the majority and minority stock of the Tribune Company, the minority group discovered that the sale of the majority shares had been at the price greatly in excess of that received by the minority. All the minority stockholders sued for an accounting. Three of these suits were commenced in the year 1922. The majority group, including plaintiff and the trust, were made defendants, and they, particularly Fulmer, were charged with a breach of fiduciary duty to the minority.

The first of these suits to be tried was decided in 1923, in favor of the minority stockholder. After appeal, judgment became final in 1927. Final judgments in the other suits were entered in 1932. Judgments against plaintiff and the trust totalled $124,331.90. Of this amount plaintiff has paid $75,528.35, plus interest on judgments of $16,312.39, and court costs of $3,635.05. Plaintiff also expended $15,413.57 for the expenses of litigation and suffered a loss of $75,000 on the depreciation of assets transferred by him to trustees to secure payment of the judgments. Since 1935, plaintiff has been without any funds to make further payments on the judgments.

Plaintiff's income tax return for 1922 was filed on March 12, 1923, on a cash basis. It did not report any taxable profit on the sale of the Tribune Company stock. Attached to the return, however, was a statement relating some of the story of that sale as it had developed up to the date of the return and closing with this statement:

> It is impossible for me at this time to determine what my net gain or loss will be from the transaction, owing partly to the fact that the suits are undetermined, and partly to the fact that I do not know at present what my expenses in the litigation will be. A statement at this time as to the transaction arriving at a gain or loss would be entirely guesswork. As soon as these matters are determined I will request permission to file an amended return for the year 1922.

A similar statement was attached to the tax return for 1922 of the trust of which plaintiff was the beneficiary.

The Commissioner of Internal Revenue determined that

plaintiff had realized a profit in 1922 upon the sale of his own stock in the Tribune Company and also upon the sale of the stock owned by the trust under his father's will. The Commissioner's determination of profit was based upon the difference between the total sale price of the stock, less expenses, and discounts to bring the value of the notes down to their present worth, and the cost or other basis of the stock in the hands of plaintiff and the trust. Additional taxes and interest for 1922 were accordingly assessed and collected in the amount of $13,372.66. Plaintiff filed a timely claim for refund and upon its rejection instituted this suit.

Plaintiff contends that he and the trust did not, in 1922, receive from the sale of the Tribune stock any amount which could properly be regarded as gross income, because, as he contends, the transaction was incomplete. He claims, in the alternative, that if he received any amount of income, it was only $20,080.23, the amount by which the cash which he received in 1922 from the sale exceeded the stock's basis.

We think plaintiff received in 1922, within the meaning of the statute and the applicable regulations, the amount which the Commissioner used to compute his assessment. The sale of the stock was complete in that year. The warranties and covenants made by the vendors no more kept the transaction inchoate than would a warranty of title, or a covenant to observe certain building restrictions on land retained, or not to compete with the vendee, keep a sale of land from being complete for income tax purposes. Cases such as *Virginia Iron, Coal & Coke Co.* v. *Commissioner*, (C. C. A. 4) 99 F. (2d) 919, involving an executory contract for the sale of land are not apposite. In such cases it cannot be determined until later whether the property will ever be sold or the taxpayer will continue to own it. If the option is not exercised or if the vendee under the contract fails to perform his part of the contract, there will be no question of capital gain or loss for the vendor will still have his capital. We conclude, therefore, that there was a completed sale in 1922.

Plaintiff's second contention is, as we have said, that assuming that there was a sale in 1922, he "received" for

tax purposes in that year, only the amount which came into his hands and that of the trust, and can be taxed only on the excess of that amount over the base value of the stock. The cash and notes all came, in 1922, into the hands of Fulmer. The cash, less expenses, was distributed and plaintiff received his share. The notes had a "readily realizable market value" within the meaning of Section 202 (a) (3) (c) of the Revenue Act of 1921 (42 Stat. 227, 230), and of Treasury Regulations 62 (1922 edition), article 1564. Although they were payable to Fulmer, he was the agent or trustee of plaintiff for plaintiff's proportionate share of them. If plaintiff had been the sole beneficiary of Fulmer's agency or trusteeship of the notes, he could have demanded their transfer to him. As it was, he was as much entitled to have possession of them as any partner or other co-owner is entitled to have possession of the common property. In short, his proportionate share of the notes became, in 1922, his property in the hands of his agent or trustee. In view of what is said in the next paragraph of this opinion, the fact that a small amount, some $12,000, of the funds in Fulmer's hands was in 1922 by court order subjected to a trust to satisfy the possible outcome of the Stappenbeck litigation does not affect our conclusion.

Plaintiff's right, as well as those of Fulmer and the other majority stockholders to retain all the proceeds of their sale, was attacked in litigation beginning in 1922, and concluding adversely to them some years later. But this fact did not, under the authorities, postpone plaintiff's tax liability until the outcome of the litigation was known. *North American Oil Consolidated* v. *Burnet*, 286 U. S. 417, 424. The court said in that case:

> If a taxpayer receives earnings under a claim of right and without restriction as to its disposition, he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent.

See also *McDuffie, Trustee*, v. *United States*, 85 C. Cls. 212; *Schramm* v. *United States*, 93 C. Cls. 181.

Our conclusion is that plaintiff was not overtaxed and is not entitled to recover. His petition is, accordingly, dismissed.

It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, concurring:

I concur in the result, but for a different reason.

Plaintiff is endeavoring to escape the consequences of an illegal transaction, as disclosed by his own pleadings and the documentary evidence of record.

Since suits were filed by minority stockholders during the taxable year, 1922, the year of receipt, it is doubtful whether the taxpayer received the earnings "under a claim of right with full power of control and disposition." The exercise of any such power over a portion, at least, of such funds was prevented by court order made in 1922.

Even conceding that the taxes were properly assessed in 1922, there is some question whether plaintiff might not have the right to a refund on the facts, later revealed, showing that he did not own a certain percentage of the monies and notes that were received, but that such percentage actually belonged to the minority stockholders. On that percentage plaintiff had paid taxes on property that belonged not to him but to others.

On account of the apparent fraud on the minority stockholders, with which plaintiff was intimately connected, or at least had knowledge and with such knowledge became, or was willing to become, the beneficiary, he is not equitably entitled to recover.

To avoid any possibility that a subsequent taxpayer with a just cause might be foreclosed on the other issues, I prefer to place the decision on the latter ground.

Plaintiff having sought to benefit from an illegal transaction may not now recover on the showing that his attempt failed.

RUST ENGINEERING COMPANY v. THE UNITED STATES

[No. 43302. Decided December 1, 1941]

On the Proofs

Government contract; specifications carelessly written and ambiguous.—Where plaintiff entered into a contract with the Government to furnish all labor and materials and to perform all work required for the construction of a complete steam generating plant, to be known as the Central Heating Plant for Public Buildings, in the District of Columbia; said contract including furnishing and installing all necessary electrical wiring, as set forth in the specifications, and for which electrical work plaintiff contracted with a subcontractor, which subcontractor based its bid on wiring and insulation approved by the National Electrical Code, as called for under one paragraph of the original specifications; and where said original specifications were carelessly written and contradictory; and where under amended specifications plaintiff was required to install, and did install, a more expensive insulation; it is *held* by the court that the ambiguity in the original specifications should be resolved in plaintiff's favor, and plaintiff is entitled to recover.

Same.—Where the specifications are carelessly written and ambiguous, contractor is not licensed to disregard such portions as are plain.

Same; illegal installation.—If an owner invites bids for an illegal installation, the bidder is not privileged to submit a bid, and, if it is accepted, claim that he has a contract for a much cheaper lawful installation.

The Reporter's statement of the case:

Mr. Alexander M. Heron for plaintiff. *Messrs. Bynum E. Hinton* and *William L. Owen* were on the brief. *Mr. Herman J. Galloway* was of counsel.

Mr. H. A. Bergson, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Joseph C. Duggan* was on the brief.

The court made special findings of fact as follows:

1. Plaintiff is a corporation organized under the laws of the State of Delaware, with an office and place of business in the city of Pittsburgh, Pennsylvania.

2. On December 21, 1932, the defendant, represented by Assistant Secretary of the Treasury Ferry K. Heath as contracting officer, entered into a contract designated T1SA 3859 with plaintiff whereby for $1,489,900 plaintiff agreed to furnish all labor and materials, and perform all work required for providing a complete steam generating plant, to be known as the Central Heating Plant for Public Buildings, to be situated at a determined location in the District of Columbia. Made a part of the contract were specifications dated October 27, 1932, addenda thereto dated November 7, 1932, November 21, 1932, November 23, 1932, and November 25, 1932.

3. The furnishing and installation of electrical wiring was included in plaintiff's contract, and forms the sole subject matter of this suit.

This work included furnishing and installing (1) wiring outside the building, running underground and in tunnels, most of which was power and light cable to carry 600 volts or less; (2) wiring under the basement floors, and in the basement walls and ceilings, to carry 600 volts or less; (3) wiring on the main floors of the building around and above the boiler locations, most of which was to carry 600 volts or less; (4) wiring on the main floors of the building, in the portions separated from the boiler spaces by brick walls, to carry 600 volts or less; and (5) wiring in the building to carry 2,300, 4,000, and 5,000 volts. Wires and cables to carry less than 600 volts were required to have 600 volt insulation and wires and cables to carry more than 600 volts and up to 5,000 volts were required to be insulated with 5,000 volt insulation.

The wires consisted of copper conductors around which was placed insulating material. The size of each copper conductor was precisely specified in the contract requirements in terms of the accepted commercial designation as to size. All wiring was required by the specifications to be placed in conduits, which are a form of steel tubing or pipe usually installed in the concrete walls or floors of the building at the time of their construction.

The electrical wiring was to be installed before the project was put into operation.

All electrical wiring under the contract was furnished and installed by a subcontractor.

4. Article 1557 of the specifications provided:

> 1557. *Standards*.—In the furnishing and installing of all electrical work, the Contractor shall comply strictly with the latest edition of the National Electrical Code of the National Board of Fire Underwriters for Electric Wiring and Apparatus. He shall also comply with the latest standards of the American Institute of Electrical Engineers wherever applicable.

Article 1713 of the specifications was as follows:

> 1713. *Wires and Cables*.—All wires and cable, whether braided or lead-covered, except "Parkway" cable, wires for the pressure indicating circuits, and signal systems, shall be of the flame-proof type, built to meet the "Navy Department Specification" No. 15C1G, dated May 1, 1931, which may be obtained from the Bureau of Supplies and Accounts, Navy Department, Washington, D. C.

Article 11 of the Specifications provided:

> 11. *Explanations to Bidders*.—No oral interpretation will be made to bidders as to the meaning of drawings and specifications. Requests for such interpretations should be made in writing, addressed to the Supervising Architect. Any interpretations made to bidders will be in the form of an addendum to the specification, which if issued, will be sent to all bidders 10 days before the opening of bids unless the urgency of some interpretation warrants an earlier date.

5. Some time before any of the wiring had been installed, it was discovered that many of the conduits specified were too small to contain wires insulated with the thickness of insulation called for in Navy Specification 15C1G.

On March 16, 1933, United Engineers & Contractors, Inc., supervising engineers for the Government, wrote plaintiff as follows:

> In view of the unusual thickness of insulation on flame-proof cable, called for by "Navy Department specification" No. 15C1G, dated May 1st, 1931, it is requested that you submit your proposal for the deduction you will allow from the contract price in the event that paragraph 1713 of the specification should be

modified to read as given on the attached draft of proposed revision.

In this connection please consider the possibility of saving arising from the opportunity to use smaller conduits in locations where the conduit sizes have not been specified on the plans and specifications but have been allowed to be determined after the proper sizes of wire for control in signal circuits, etc., have been selected.

Please submit the proposal in quadruplicate (2 copies to be signed). Proposal should be addressed to the Office of the Supervising Architect and mailed to this Company at Post Office Box 356, Washington, D. C., unless delivered by messenger.

The draft of the proposed revision of paragraph 1713 of the specifications, attached to this letter, was as follows:

PROPOSED REVISION OF PARAGRAPH 1713 OF SPECIFICATIONS

1713. *Wires and Cables.*—All wires and cables whether braided or lead covered except Parkway Cable, wires for the pressure indicating circuits, and signal systems, shall be of the flameproof type built in accordance with the Navy Department Specifications Number 15C1G, dated May 1, 1931, except as to thickness of insulation and covering, which shall be as specified in the following tables:

SINGLE CONDUCTOR—600 V—BRAIDED

Size awg. bare	Solid or stranded	First felted wall	Varnished cambric	Second felted wall	Outer braid	App. O. D.
12	Solid		2—0.006″	0.020″	0.045″	0.246″
10	"		2— .006″	.020″	.045″	.267″
8	Stranded	0.015″	3— .006″	.015″	.045″	.345″
6	"	.015″	3— .006″	.015″	.045″	.385″
5	"	.015″	3— .006″	.015″	.045″	.409″
4	"	.015″	3— .006″	.015″	.045″	.434″
3	"	.015″	3— .006″	.015″	.045″	.460″
2	"	.015″	3— .006″	.015″	.045″	.495″
1	"	.015″	3— .006″	.030″	.045″	.562″
0	"	.015″	3— .006″	.030″	.045″	.604″
2/0	"	.015″	3— .006″	.030″	.045″	.650″
3/0	"	.015″	3— .006″	.030″	.045″	.700″
4/0	"	.015″	3— .006″	.030″	.045″	.760″
250,000	"	.030″	3— .006″	.045″	.045″	.865″
300,000	"	.030″	3— .006″	.045″	.045″	.920″
350,000	"	.030″	3— .006″	.045″	.045″	.971″
400,000	"	.030″	3— .006″	.045″	.045″	1.019″
500,000	"	.030″	3— .006″	.045″	.045″	1.105″

Reporter's Statement of the Case

SINGLE CONDUCTOR—600 V—LEAD COVERED

Size awg. bare	Solid or stranded	First felted wall	Varnished cambric	Second felted wall	Lead sheath	App. O. D.
12	Solid	0.015″	3—0.006″	0.030″	3/64″	0.289″
10	"	.015″	3— .006″	.030″	3/64″	.322″
8	Stranded	.015″	3— .006″	.030″	3/64″	.379″
6	"	.015″	3— .006″	.030″	3/64″	.419″
5	"	.015″	3— .006″	.030″	3/64″	.444″
4	"	.015″	3— .006″	.030″	3/64″	.468″
3	"	.015″	3— .006″	.030″	3/64″	.494″
2	"	.015″	3— .006″	.030″	4/64″	.560″
1	"	.015″	3— .006″	.030″	4/64″	.597″
0	"	.015″	3— .006″	.030″	4/64″	.639″
2/0	"	.015″	3— .006″	.030″	4/64″	.685″
3/0	"	.015″	3— .006″	.030″	4/64″	.735″
4/0	"	.015″	3— .006″	.030″	4/64″	.795″
250,000	"	.030″	3— .006″	.045″	5/64″	.931″
300,000	"	.030″	3— .006″	.045″	5/64″	.986″
350,000	"	.030″	3— .006″	.045″	5/64″	1.037″
400,000	"	.030″	3— .006″	.045″	5/64″	1.085″
500,000	"	.030″	3— .006″	.045″	5/64″	1.171″

SINGLE CONDUCTOR—5,000 V—BRAIDED

Size awg. bare	Solid or stranded	First felted wall	Varnished cambric	Second felted wall	Outer braid	App. O. D.
2	Stranded	0.015″	12—0.006″	0.030″	0.045″	0.705″
1	"	.015″	12— .006″	.030″	.045″	.742″
0	"	.015″	12— .006″	.030″	.045″	.784″
2/0	"	.015″	12— .006″	.030″	.045″	.830″
3/0	"	.015″	12— .006″	.030″	.045″	.880″
4/0	"	.015″	12— .006″	.030″	.045″	.940″
250,000	"	.030″	12— .006″	.045″	.045″	1.045″
300,000	"	.030″	12— .006″	.045″	.045″	1.100″
350,000	"	.030″	12— .006″	.045″	.045″	1.151″
400,000	"	.030″	12— .006″	.045″	.045″	1.199″
500,000	"	.030″	12— .006″	.045″	.045″	1.285″

SINGLE CONDUCTOR—5,000 V—LEAD COVERED

Size awg. bare	Solid or stranded	First felted wall	Varnished cambric	Second felted wall	Lead sheath	App. O. D.
2	Stranded	0.015″	12—0.006″	0.030″	4/64″	0.740″
1	"	.015″	12— .006″	.030″	4/64″	.777″
0	"	.015″	12— .006″	.030″	4/64″	.819″
2/0	"	.015″	12— .006″	.030″	5/64″	.896″
3/0	"	.015″	12— .006″	.030″	5/64″	.946″
4/0	"	.015″	12— .006″	.030″	5/64″	1.006″
250,000	"	.030″	12— .006″	.045″	5/64″	1.112″
300,000	"	.030″	12— .006″	.045″	5/64″	1.167″
350,000	"	.030″	12— .006″	.045″	5/64″	1.218″
400,000	"	.030″	12— .006″	.045″	6/64″	1.296″
500,000	"	.030″	12— .006″	.045″	6/64″	1.382″

NOTE.—To allow for variation in manufacture a tolerance of 5% plus or minus will be allowed in the outside diameter of finished cable.

Multiple conductor control cables shall be manufactured as follows:

Individual conductor #19/22 shall be covered with—

First felted wall of asbestos 0.015″ thick,
Three layers 0.006″ varnished cambric,
Second felted wall of asbestos 0.015″ thick,
Color coded cotton braid.

The assembled conductors with jute fillers if required for circularity, shall be covered with a moisture-proof tape and overall with an asbestos braid 0.045″ thick. Where lead-covered control cable is required a lead sheath shall be substituted for the outer braid. Thickness of lead sheath shall be in accordance with Table VI of the Insulated Power Cable Engineers Association Specifications.

Multiple conductor cable for general use shall be manufactured as follows:

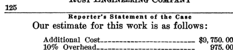
Individual conductors shall be insulated as covered in the tables for that size and service, except a cotton braid shall be substituted for the asbestos braid, and the assembly covered with a moisture-proof tape and 0.045″ asbestos outer braid or lead sheath of thickness called for by Table VI of the I. P. C. E. A. Specifications.

The copper in all conductors shall have a conductivity of not less than 98% of the I. A. C. standard. All felted asbestos layers and all outer braids shall be impregnated with a flameproof and moisture-resisting compound.

6. After further correspondence, plaintiff replied to the request of United Engineers & Contractors, Inc., on June 27, 1933, in the following letter to the Supervising Architect:

In reply to your letter of June 20, which refers to the wiring in the Central Heating Plant for Public Buildings, Washington, D. C., we are pleased to submit herewith our proposal to install wiring throughout the plant of exact construction specified, but of insulated thickness as furnished us in the schedule as prepared by the United Engineers and Constructors, under date of March 16, 1933.

Our estimate for this work is as follows:



Additional Cost	$9, 750. 00
10% Overhead	975. 00
	10, 725. 00
10% Profit	1, 072. 50
	11, 797. 50

We would appreciate your advice concerning this matter.

7. On August 30, 1933, Assistant Secretary of the Treasury L. W. Robert wrote plaintiff as follows:

In connection with your contract for a complete steam generating plant for the Central Heating Plant for Public Buildings, this City: reference is made to the question of the electric wiring which has formed the subject of much correspondence and many conferences, and in connection with which your representative has appeared before the Board of Award. Briefly, the conduits specified are not of sufficient size to permit installation of the special heavily insulated wire specified, and to change the conduits at this time would be very expensive or practically impossible. Several solutions of the situation have been offered, and the best seems to be that covered by your proposal of June 27th, to install the wiring as specified in the conduit as specified, but with a thinner insulation, and for this change which logically would call for a deduction, you name in your said proposal an addition of $11,797.50, based on an additional cost claimed by you of $9,750.00 to which you have added the usual 10 and 10. Accompanying your proposal is the itemization of your subcontractor showing his original estimate on which he based his contract, and the revised estimate "using wire figures as per schedule prepared by United Engineers and Constructors dated March 16, 1933." The only difference in these figures appears under the item "Wires and Cables" for which is shown under the original estimate $5,995.06 and under the revised estimate $15,745.06, or a difference of $9,750.00. Your subcontractor for the wiring alleges he did not base his proposal to you on this special wire clearly called for

by the contract (evidently having figured there would have to be a necessary adjustment), and for this reason could not make a deduction for the thinner insulation.

In order not to delay this work, and in order that it may be installed with the wiring and conduit specified, but with the thinner insulation, you are ordered to proceed with the work as covered by your proposal of June 27, 1933, subject to subsequent adjustment of contract price which it is evident should be a deduction instead of an addition.

8. Section 503*l* of the National Electrical Code, omitting immaterial parts, provided:

> *l*. Conduit wire shall be of approved rubber-covered type * * *, or, if in a permanently dry location, may be of the varnished-cambric insulated type. * * * Slow-burning insulation * * * or asbestos-covered wire shall be used in permanently dry locations where the ambient temperature of the wire as installed, will exceed 120 deg. F. (49 deg. C.).

Section 503p provided:

> p. For conduit wiring installed underground or in concrete slabs or other masonry in direct contact with moist earth, or in other permanently moist locations where subject to the condensation of moisture, the conductors shall be of the lead-covered type, or of other type specially approved for this purpose.

Section 603 stated that varnished-cambric-covered wire was not intended for use where moisture existed and 604 stated that asbestos-covered wire was especially useful in hot, dry places where ordinary coverings would perish, and where wires were bunched as on the back of a large switchboard or in a wire tower, in which the accumulations of rubber covering would result in a large mass of highly inflammable material, and it was stated to be not suitable for outside work or moist locations.

The only flameproof conduit wire insulation considered in the National Electrical Code was asbestos, and asbestos insulation was not therein classed as moisture-resistant or moistureproof.

9. The flameproof insulation described in Navy specifications 15C1G was asbestos. The asbestos insulation required was described therein as follows:

> 1. The asbestos roving or felting and yarn shall be made from the best quality of long-fiber asbestos, and shall be free from metallic oxides. It shall contain not more than 15 percent of cotton.
>
> 2. The insulation shall be applied so as to provide a circular cross section in which the conductor shall be well centered in the insulating wall. The asbestos over the conductor, including both roving and braid, shall be thoroughly impregnated with a moisture-resisting insulating compound in such manner as to completely fill all interstices and make the insulation one homogeneous structure.
>
> 3. The compound used to saturate the asbestos shall consist of suitable high-grade ingredients and shall retain its initial qualities during the life of the cable. The compound shall develop no injurious chemical action within itself or with any other of the component parts of the completed cable.
>
> 4. The finished insulation shall be of such composition and structure as will enable the cable to meet the bending, elongation, flameproofness, and dielectric strength tests outlined in paragraph 6 herein.

Navy specifications 15C1G were issued for shipboard use and were designed to meet the needs of seagoing craft in which heat and moisture played an important part.

10. Of the flameproof cable described in Navy specifications 15C1G types SFPC-3 and SFPC-4 to 7 are therein described as follows:

> *Type SFPC-3:*
>
> First. The conductor shall consist of 7 copper wires (4b), each 0.025 inch in diameter, stranded with a right-hand lay.
>
> Second. A felted layer of asbestos (4g), applied in the form of untwisted asbestos roving, compressed and impregnated with a black neutral insulating cement to form a continuous and homogeneous layer not less than 0.030 inch in thickness.
>
> Third. A closely woven, uniform, asbestos braid (4g); the braid shall be impregnated with a black flameproof insulating cement.

The diameter of the completed cable shall not exceed 0.250 inch.

Types SFPC-4 to 7 (*single conductor*): Single-conductor power cable in the flameproof construction shall be made up in accordance with the following description and table of dimensions:

First. The stranded conductor (4b).

Second. A layer of felted asbestos (4g), applied in the form of untwisted asbestos roving, compressed and impregnated with a black, neutral insulating cement, to form a continuous and homogeneous layer.

Third. Varnished cambric insulation, minimum of three layers (4d).

Fourth. A layer of felted asbestos, applied as in "Second" above.

Fifth. A closely woven, uniform asbestos braid (4g); the braid shall be impregnated with a black, flameproof insulating cement.

The dimensions shall be not greater than the values shown in the following table, nor less than 92½ percent of those values:

Type	Copper data				Insulated cable			
	Actual circular mills	Number of wires per conductor	Diameter of wire	Diameter over copper	Diameter over first felted asbestos	Diameter over varnished cambric	Diameter over second felted asbestos	Diameter over asbestos braid
			Inch	*Inch*	*Inch*	*Inch*	*Inch*	*Inches*
SFPC-4	75,850	37	0.045	0.317	0.407	0.515	0.605	0.695
SFPC-5	98,820	61	.040	.363	.453	.561	.651	.741
SFPC-6	157,380	61	.051	.457	.547	.655	.745	.835
SFPC-7	296,660	91	.057	.628	.718	.826	.916	1.006

The insulation specified in SFPC 3 could be used to carry 600 volts and under. For such capacity it complied with the National Electrical Code for use in dry locations. That insulation would not be adequate for more than 600 volts. Wires to carry more than 600 volts required insulation of the type described in SFPC 4–7, but the thickness of varnished cambric insulation would have to be increased as prescribed by good manufacturing standards.

11. In preparing its bid plaintiff and its subcontractor disregarded the Navy specifications for flameproof insulation and based the estimate on rubber insulation which conformed

to the National Electrical Code. It is not proved that plaintiff was aware at that time of the fact that the wires in the Navy Specification were too large to be drawn through some of the conduits.

12. The wiring furnished complied with the March 16, 1933, revision of Article 1713, and the parties have agreed that this revision required a change in the contract price, but have not agreed as to the direction nor the amount in which the price should be changed.

13. Plaintiff performed all of the work required by the contract and the revisions thereof, and on June 26, 1935, received check No. 5245, in the sum of $14,688.74, the last payment on the work done under the contract, subject to the understanding that plaintiff thereby waived no rights to make further claim under the contract. No deduction from or addition to the contract price was made as a result of the revision of paragraph No. 1713 of the specifications.

14. The reasonable value of the wire installed pursuant to the revision of March 16, 1933, was $21,428.62.

The reasonable value of the wire on which plaintiff based its bid (see finding 11) was $6,229.41.

The reasonable value of wire meeting the requirements of Navy Specifications 15C1G without regard to the impossibility of drawing it through the conduits specified by the contract, was $16,646.69.

The court decided that the plaintiff was entitled to recover.

Madden, *Judge*, delivered the opinion of the court:

Plaintiff was the successful bidder for a contract to construct for the defendant in the District of Columbia a complete steam generating plant to be known as the Central Heating Plant for Public Buildings. The contract was made on December 21, 1932. The contract price was $1,489,900.

This suit relates to the electrical wiring installed by plaintiff under the contract. Plaintiff has been paid the full contract price for the job as a whole, but claims $18,-391.04 as extra compensation because of a change made in the specifications for wiring after the contract had been

made. The circumstances of the change were as follows. Article 1557 of the Specifications which was in that part of the Specifications relating to electrical work as a whole provided:

> 1557. *Standards.*—In the furnishing and installing of all electrical work, the contractor shall comply strictly with the latest edition of the National Electrical Code of the National Board of Fire Underwriters for Electric Wiring and Apparatus. He shall also comply with the latest standards of the American Institute of Electrical Engineers wherever applicable.

Article 1713, which relates specifically to the electric wires and cables to be used, provided:

> 1713. *Wires and cables.*—All wires and cable, whether braided or lead-covered, except "Parkway" cable, wires for the pressure indicating circuits, and signal systems, shall be of the flame-proof type, built to meet the "Navy Department Specification" No. 15C1G, dated May 1, 1931, which may be obtained from the Bureau of Supplies and Accounts, Navy Department, Washington, D. C.

In March 1933, the supervising engineers for the Government wrote plaintiff asking how much of a deduction would be allowed if a proposed accompanying revision of paragraph 1713 were followed which reduced the thickness of the layers of insulation on the wires. Plaintiff's proposal in response was that there should be an addition to the original price of $11,797.50. In August 1933, the defendant wrote plaintiff, referring to the fact that there had been much correspondence and many conferences about the question in the meantime, stating that the conduits specified were not large enough to contain the thickly insulated wire specified, and ordering plaintiff to proceed with the installation according to the March proposed revision of article 1713 "subject to subsequent adjustment of contract price, which it is evident should be a reduction instead of an addition." Plaintiff thereupon proceeded to install the wiring as directed and to complete the contract otherwise. The defendant paid the unpaid balance of the contract price, which plaintiff received on the understanding that it did not waive its rights to make further claims under the contract.

Since the 1933 revision of the wiring specifications reduced the thicknesses of the layers of insulation on the wires, the defendant's assertion in its August 1933 letter that the price should be revised downward would seem to be well founded. But plaintiff claims the price should be increased, and is suing here for that increase. It says that the specifications, before the 1933 revision, were ambiguous; that they required that the installation be in compliance with the National Electrical Code as well as with the Navy Department Specification 15C1G; that the Navy specifications related to wire, the diameter of the conductor or metal core of which was measured in thousandths of inches, which even when translated into units of circular mills were not equivalent to the gauges expressly stated in the specifications; that the flame-proof type of insulation required by article 1713 and by the Navy specifications for insulation were not sanctioned by the Code for installations requiring moisture-proof insulation; that plaintiff's subcontractor for all the electrical work, in making up its estimate for its bid on the contract, intended to resolve the ambiguity by using the sizes of metal conductors set out in the specifications, covered with insulation approved by the National Electrical Code, viz, rubber insulation; that such wiring would have cost only $6,229.41, whereas the wiring actually installed under the revised specifications was worth, as the defendant concedes, $21,428.62; that plaintiff should therefore recover the difference, or $15,199.21. Plaintiff also claims the right to add 10% for profit and 10% for overhead, making a total of $18,391.04.

It is stipulated by the parties that plaintiff's subcontractor did make its estimate on the basis described above. Our question is whether it was justified in so doing so as to entitle plaintiff to extra compensation for finally making a more expensive installation. As we have said, the National Electrical Code requirement was given in a part of the specifications relating generally to all the electrical material and work of the contract. Article 1713, on the other hand, related specifically to the wiring; it said expressly that the insulation should be flame-proof, which rubber insulation is not; it said the insulated wire must be "built to meet the

'Navy Department Specification' No. 15C1G, dated May 1, 1931, which may be obtained from the Bureau of Supplies and Accounts, Navy Department, Washington, D. C.". The Navy specification of asbestos and varnished cambric is plain.

On these specifications, plaintiff and its subcontractor had no right to disregard the plain specification of flame-proof insulation to be built up in a specified way of specified materials, and submit its bid on the basis of a different and cheaper insulation. The specifications were carelessly written, but that did not license plaintiff to disregard those portions of them that were plain. If it had occurred to plaintiff when making up its bid that there was an inconsistency between the general requirement that all the electrical installation should conform to the National Electrical Code, and the particular requirement that the insulation be flame-proof and of a particular type, it should have done what the invitation for bids provided, make a request for an interpretation addressed to the supervising architect. This should also have been its procedure if it was troubled by the fact that, as it claims, the Navy specifications for insulation were in violation of an applicable Regulation issued under the District of Columbia Code. We do not decide whether or not the Code was applicable. If an owner invites bids for an illegal installation, the bidder is not privileged to submit a bid and if it is accepted, claim that he has a contract for a much cheaper lawful installation. In any event the claim of illegality seems to be an afterthought as the revised specifications under which plaintiff made the installation without raising any question of illegality, were also in violation of law if the original Navy specifications were.

Plaintiff says that even if it should have estimated its bid on the basis of the Navy specification of flame-proof insulation, it should have counted only on using the type and thickness of insulation called for by Navy specification SFPC 3, which was asbestos with no varnished cambric, and which while more expensive than rubber, was considerably cheaper than that called for by Navy specification SFPC 4–7, which required two layers of asbestos and a layer of var-

nished cambric between them, and was a thicker cable. The specifications required insulation sufficient for 600 volts on all wires carrying any load less than 600 volts. The defendant's expert testified that wires insulated according to SFPC 3, installed as these were to be installed, were not adequate for 600 volts. Plaintiff's experts testified that they would carry 600 volts, but upon cross-examination said they would not advise their use for so heavy a load. In view of the fact that the specifications were carelessly drawn, and that a choice was to be made which plaintiff might, not altogether without reason, have made as it contends, we resolve the ambiguity in the specification in plaintiff's favor and treat it as if it had bid on SFPC 3 for the wires carrying no more than 600 volts. As to those carrying more than 600 volts, the Navy specifications gave no exact directions. Plaintiff should, however, have counted on their being "flame-proof" and on using the cambric and asbestos insulation called for by the Navy specification, and on their being built up to good manufacturing standards as any manufacturer would have known how to do, given the size of the metal conductor, the voltage to be carried, and the insulating material to be used.

The actual installation made under the revised specification used the type of asbestos and varnished cambric insulation called for in SFPC 4–7, but with thicknesses of insulation reduced so that the wires would go into the conduits. This made the wires carrying less than 600 volts more expensive than SFPC 3 wires would have been. The wires carrying more than 600 volts, as actually installed, were probably less expensive than the ones that should have been estimated for, since the thickness of the insulation was reduced.

The fact that the Navy specifications, as we are asked by the defendant to interpret them, called for insulation so thick that wires thus insulated could not be drawn through the already installed conduits seems to have had nothing to do with the amount of plaintiff's bid. There is no proof that plaintiff was aware of this fact when it made its bid. If it had been so aware, it would still not have been privileged to substitute another type of insulation, not only thinner, but of a wholly different and cheaper material.

We conclude, therefore, that plaintiff's bid, on the basis of rubber insulation, may not be used in determining whether and how much the revised specifications increased the cost of plaintiff's performance. We have stated above what should have been the basis of plaintiff's bid. On that basis its performance would have cost $16,646.69. Its actual performance under the revised specifications cost $21,428.62. It is entitled to recover the difference of $4,781.93, together with an allowance of $478.20 for overhead and a profit of ten percent, or $526.01, on the sum of excess cost and overhead. This makes a total of $5,786.14 and judgment will be entered for plaintiff in that amount.

It is so ordered.

JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

DOUGLAS AIRCRAFT COMPANY, INC., v. THE UNITED STATES

[No. 44837. Decided December 1, 1941]

On the Proofs

Government contract; award made without advertising for bids; cost of manufacture including proportionate part of development cost.—Where defendant, without advertising for bids, as required by law, contracted with plaintiff for the manufacture and delivery of airplanes of a certain type developed at its own expense by plaintiff; and where plaintiff did manufacture and deliver such airplanes in accordance with said contract; and was paid therefor, except, however, for a deduction withheld by the Comptroller General purporting to reduce the price of said airplanes to the audited direct costs of labor and materials plus ten percent profit; it is *held* that the cost of said airplanes, properly computed, should include a proportionate part of the cost of developing such model of airplane, and the plaintiff accordingly is entitled to recover.

Same; indefiniteness of proof.—Where plaintiff in developing a new type of airplane did not set up on its books development costs, and where the need for ascertaining and recording such development costs arose from the failure of defendant to advertise for bids, as required by law, before awarding to plaintiff certain contracts for the particular type of airplane in question; it is *held* that plaintiff's claim should not be dismissed because of indefiniteness of proof unless the proof is really so indefinite as to make an intelligent judgment impossible.

Same; computation of development costs.—In computing development costs, where no record of such costs was kept, changes in conditions, including fluctuations in the cost of labor and material during the period of development, may be taken in account.

Same; fault of defendant; responsibility.—In a situation such as existed in the instant case, where confusion has been caused by the fault of the defendant, said defendant may not stand aloof and take no responsibility for assisting in resolving the difficulty.

The Reporter's statement of the case:

Mr. J. Edward Burroughs, Jr., for plaintiff. *Messrs. William Stanley* and *William D. Donnelly* were of counsel.

Mr. Carl Eardley, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff, Douglas Aircraft Company, Inc., is, and at all times hereinafter mentioned, was a corporation engaged in the manufacture and sale of airplanes and having its principal office and place of business in the city of Santa Monica, California.

2. In 1929 plaintiff concluded that there was a need for commercial amphibian airplanes, and commenced manufacture of airplanes of this type under shop order 500. Plaintiff executed its first contract for such an airplane in 1931, and during the period of 1931 to 1935 manufactured and sold to private and public buyers a total of fifty-nine (59) such planes which it termed "Dolphin amphibians," all these airplanes being the same design, model, and size with the exception of certain minor details of design. Since the completion of this program in 1935 there have been no other

planes of a similar design, model, or size manufactured by plaintiff.

The experimental or development work in connection with the manufacture of these amphibians was largely completed on shop orders 500, 760, and 925.[1]

3. On January 8, 1934, plaintiff by a written contract, No. 34194, agreed to manufacture and sell six (6) of the Dolphin amphibians to the Navy Department for transport service.

On January 15, 1935, plaintiff, by written contract No. 34223, agreed to manufacture and sell ten (10) of the Dolphin amphibian airplanes to the Navy Department for patrol and rescue service by the United States Coast Guard.

On May 2, 1934, plaintiff, by a written contract, TCG–22240, agreed to sell to the Navy Department ten (10) mechanical remote control loop and indicator assembly equipments.

Shop order 340 was assigned to the three above-mentioned contracts, which were a part of what is known as the "amphibian program."

4. Plaintiff performed these contracts in each particular, and in the case of contract TCG–22240 and 34194 received the stipulated amount, to wit, $297,378.77 for contract 34194 and $2,980 for contract TCG–22240. The contract price for the airplanes furnished under contract 34223 was $446,932.69, of which plaintiff was paid $357,252.15, leaving an unpaid balance of $89,680.54 on this contract. This balance the Comptroller General refused to pay, on the ground that contracts 34194 and 34223 were invalid since they were executed without first advertising for bids. He ruled that plaintiff was only entitled to the reasonable value of the airplanes and parts furnished under these contracts, which he administratively determined to be cost plus 10 percent. Based upon data supplied by the Navy Department after

[1] Shop order numbers in the Douglas plant run consecutively from 1 to 1,000, and then begin again at 1, so that subsequent reference to a shop order of a lower number in these findings does not necessarily mean that it was issued prior to a shop order of a higher number.

an investigation by it of plaintiff's records, he held the reasonable cost to be as follows:

Contract No.	Cost	Ten percent	Total
34194	$207,124.65	$20,712.47	$227,837.12
34223	311,289.12	31,128.91	342,418.03
Total due			570,255.15

He did not include any amount for the cost of developing the Dolphin model of plane in his determination of reasonable value.

The Comptroller General held that plaintiff had been overpaid the sum of $69,541.65 on contract No. 34194, and $14,834.12 on contract No. 34223, or a total of $84,375.77.

5. The direct cost was in fact $208,600.03 on contract No. 34194 and $313,506.48 on contract No. 34223, a total direct cost of $522,106.51, which plus 10% equals $574,317.16, or $4,062.01 more than the Comptroller General's audit showed.

The table below shows the contract prices, the amount paid and the actual cost on each contract.

Contract	Contract price	Amount paid	Cost plus 10%	Difference between cost and payment
34194	$297,378.77	$297,378.77	$229,460.03	$67,918.74
34223	446,932.69	357,252.15	344,857.13	12,395.02
		654,630.92	574,317.16	80,313.76

6. Plaintiff and the Government subsequently entered into several other contracts (Nos. 31409, 46330, 47852, 48135, 48566, 50759 and 54163), each of which was fully performed by plaintiff.

The Comptroller General has withheld and is now withholding $86,169.03 of the total contract price of these contracts because of the alleged overpayments on the prior contracts 34194 and 34223. In connection with this sum, however, the Comptroller General has tendered payment to plaintiff in the amount of $1,793.26, which tender plaintiff has rejected ($86,169.03 − $1,793.26 = $84,375.77. See Find-

ing 4). That sum plus the difference of $4,062.01 in direct costs equals $5,855.27.

The sum of $86,169.03, withheld as stated, is in addition to the sum of $89,680.54 withheld in connection with the payment under contract 34223 (see Finding 4).

7. In connection with the design, manufacture, and marketing of any particular series or model of airplanes it has been the customary practice and procedure of plaintiff to construct the first airplane of such series largely by hand and to carry on the necessary experimentation, test flights and development work with the first planes of the series.

As the design becomes perfected, certain jigs, dies, and other implements for multiple production are made. The manufacture of these instruments is known as "tooling." There is a transition period during the manufacture of the first few airplanes of the series, the work progressing during the period from hand production to quantity, or semi-mass production.

The cost of producing the first planes of a new model under this program is always high, the cost decreasing until a certain quantity production level is reached.

8. Plaintiff's books, records, and shop orders relating to the manufacture of airplanes reflect only actual costs of each order, it being plaintiff's policy until 1935 to absorb all development or experimental costs as they occurred, and plaintiff did not record or segregate in its books its development costs as such. The recorded costs on shop order 340 (the shop order which carried the Government contracts in issue) do not represent and do not include any original development or experimental costs.

9. In connection with the absorption of development costs in the Dolphin amphibian program or series, the average cost per plane, compared with the sales price per plane under the first three shop orders of this program, was as follows:

	Number of planes	Cost	Price
Shop order 500	1	$94,199.66	$19,981.79
" " 760	5	49,522.48	24,016.94
" " 925	10	29,081.33	24,189.59

During the middle of plaintiff's Dolphin amphibian program, average costs and prices per plane were as follows:

	Number of planes	Cost	Price
Shop order 170	9	$25,641.16	$30,201.38
" " 250	6	26,286.82	33,309.83
" " 340	[1] 16	26,725.50	In issue

[1] Defendant's contracts.

The average cost per plane of all planes produced under this latter group of shop orders was $26,325.79.

The average price per plane of all planes constructed in the Dolphin amphibian program, with the exception of shop order 340, was $30,555.96.

10. On the assumption that no variables, such as cost of labor and cost of materials, exist between the two series of shop orders tabulated in the preceding finding 9, and that the normal costs were the same in each series, the development cost of the Dolphin amphibian series is ascertainable from a comparison of these two groups of shop orders and is the amount by which costs under the first series exceeded those under the later, $211,412.84. Sixteen fifty-ninths of this amount represented the proportion of planes manufactured for the defendant under the contracts in issue to the total number of Dolphin amphibians and is $57,332.32. The amount of overhead applicable to this sum is $2,409.92, making a total of $59,742.24, or $3,733.89 per plane.

11. The figure of $59,742.24, or $3,733.89 per plane, as given in finding 10, does not accurately represent development costs because of a fluctuation in wages and the cost of aluminum during the Dolphin amphibian program.

During the period 1929 to 1935, there was an increase in the hourly wage rate in December 1933 and another increase either late in 1934 or early in 1935. There was during this period no substantial decrease in wages at any time.

The price of aluminum in January 1930 was $24.30 per 100 pounds. In December 1934 the price was $20.50 per 100 pounds. The weighted average price for aluminum during this period was $21.86 per 100 pounds.

The cost of all materials used in the first group of shop orders was $179,016.47.

12. In connection with the Government contracts herein involved and which were carried on shop order 340, certain changes were made in the tail structure or empennage of the Douglas amphibians at the instigation of defendant. The changes required by the Government related to the raising of the control surfaces so that landing in rough water would not interfere with them.

13. Shop order 380 for nine (9) commercial planes was progressing through plaintiff's plant concurrently with shop order 340, and as the first airplane under shop order 380 was in a more advanced stage of construction, a large proportion of the redesigning work on the empennage structure, which was primarily for the benefit of the defendant, was carried out on this plane, which was subjected to extensive experimentation and test flights. All the planes under shop orders 340 and 380 were substantially similar in general construction and differed only in minor details.

14. Plaintiff's books and records show the empennage design costs, including engineering and shop labor, to be as follows:

Shop order	No. of Planes	Engineering	Shop labor	Total
340	16	$25, 431. 88	$133, 607. 52	$159, 039. 40
380	9	23, 952. 78	111, 097. 71	135, 050. 49

The empennage costs pooled totaled $294,089.89, and if each of the 25 airplanes is charged with an equal share of this cost, the cost of shop order 340 would be increased by $27,782.50. Such an allocation and increase should be made.

15. The recorded cost of performing the contracts in issue without including any development cost or allocating the empennage cost was $522,106.51.

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

Plaintiff in January 1934 made two contracts, one for six and the other for ten Dolphin amphibian airplanes to be

manufactured by it and sold to the defendant. The defendant did not advertise for bids as required by statute[2] before making these contracts. After the airplanes had been delivered to the defendant, and after all but $89,680.54 of the contract price of $744,311.46 had been paid to plaintiff, the failure to advertise was noticed. The defendant took the view that the contracts were void and that plaintiff was entitled only to a reasonable price for the planes. The Comptroller General on the basis of an investigation and audit of plaintiff's books and records concluded that the cost of their manufacture, which he determined to be $518,-413.77, plus a profit of ten percent, making a total of $570,255.15, was all that plaintiff should have received. This was $174,056.31 less than the contract price, and $84,-375.77 less than the amount already paid to plaintiff under the contracts. Plaintiff subsequently had other contracts with the defendant and the defendant withheld from its payments to plaintiff on these contracts the sum of $86,-169.03, to compensate itself for its claimed overpayments on the Dolphin contracts. The Comptroller General later admitted that $1,793.26 too much had been withheld and tendered that amount to plaintiff, who refused it. The cost was actually $3,692.74 more than the amount shown in the audit, or $522,106.51.

Plaintiff's first contention is that it was entitled to the full contract price, in spite of the fact that the defendant did not advertise for bids. On that basis plaintiff would recover $175,849.57. We think that the fact that plaintiff fully performed the contracts and that the defendant paid all of the agreed price on one of them, and a large part of it on the other, does not prevent the defendant from asserting the statutory requirement. Cf. *Wisconsin Central Railroad Co.* v. *United States*, 164 U. S. 190.

Plaintiff contends, in the alternative, that if it may not recover the contract price as such, it is entitled to recover its costs incurred in the manufacture of the airplanes, plus a ten percent profit. The defendant concedes that principle. But the parties disagree as to what those costs were. The Comptroller General's audit allowed plaintiff the actual

[2] United States Code, tit. 41, sec. 5.

direct costs of the labor and materials which went into the sixteen planes, plus ten percent for profit. Plaintiff claims that the cost of these planes, properly computed, should include an appropriate part of the cost of developing the model of plane.

Only fifty-nine planes of the Dolphin model were manufactured by plaintiff. In developing a new model, the first unit is built almost entirely by hand, and at great cost. Then tools, jigs and dies for multiple production of parts are made, and workmen are trained. Not until some three shop orders or groups of planes are manufactured do the costs level off to what becomes normal for regular production. On this model, the cost of building the one plane on the first shop order was $94,199.66, the sale price was $19,981.79; on the next shop order, the corresponding average figures for each plane were $49,522.48 and $24,016.94. The immediate cost of the planes built for the defendant was $26,725.50 per plane, and the contract price was $46,519.44 per plane.

Plaintiff contends that the development cost of the model is the amount by which the costs of the early built units, before costs leveled off to normal, exceeded the normal costs. It says that the defendant should bear its proportionate share of that development cost, sixteen fifty-ninths, because it got sixteen of the fifty-nine planes of this model which plaintiff manufactured. Defendant does not deny that development costs should properly be included, but asserts that plaintiff has not shown what they were with sufficient accuracy to enable the court to fix their amount.

It is true that plaintiff, at the time it manufactured the planes in question had no systematic method of allocating certain costs and calling them, on the books, development costs. Its need for such figures in the present case results from the fault of agents of the government in not advertising for bids as the statute required. Plaintiff should not be penalized for not setting up a system of bookkeeping to meet that contingency. We should not, therefore, dismiss plaintiff's claim because of indefiniteness of proof unless the proof is really so indefinite as to make an intelligent judgment impossible. We think it is not so here.

Comparison of the costs of the first made units with those of the units made after normal production was reached would give us the development costs, if other conditions remained unchanged. The defendant says that other conditions did not remain unchanged. It points to the price of aluminum and of labor. As to labor, we find that the only material changes in wage rates between 1929, when the first plane of this model was begun, and 1935, when a normal level of costs had been reached, were increases in 1933 and 1934 or 1935. That change operates in favor of the defendant, since it keeps down the early cost, increases the later cost, and thus reduces the difference between them, which plaintiff claims as the development cost. The price of aluminum, however, did go down from $24.30 per hundred pounds in January 1930 to $20.50 in December 1934. That change would tend to make plaintiff's method of ascertaining development costs inaccurate. Plaintiff offers, in its brief, a method of eliminating this inaccuracy. Its suggestion is as follows: the $24.30 cost of aluminum for the early made planes exceeded the weighted average cost of $21.86 for aluminum used in planes manufactured after production became normal by approximately 10%; assume that the price of all materials used in the planes fell 10% between the time of making the first planes and the later ones; take 10% of the cost of all materials used in the early series, $179,016.47; the result is $17,901.65; deduct the $17,901.65 from $211,412.84, the amount of the development cost if fluctuations in prices were disregarded; this gives $193,-511.19 as the corrected development costs; take 16/59 of that amount, or $52,477.60, as the defendant's proportionate part; add overhead adjusted to this reduced figure in the amount of $2,193.60, giving an adjusted figure for the defendant's share of the development costs of $54,671.20.

We think this method of computation is acceptable, with one minor exception,[3] in the absence of better available proof. It does not substantially prejudice the defendant unless the cost of some important material, other than

[3] Our computation of the adjusted overhead is $2,205.86:

$$(\$2,409.92-\frac{17,901.65}{211,412.84}\times 2,409.92) \text{ instead of } \$2,193.60.$$

aluminum, fluctuated downward more than ten percent during the period here in question. We think that if that had occurred, the defendant would at least have raised the question as to that particular material. In a situation such as this, where the confusion has been caused by the fault of the defendant, we think it may not stand completely aloof and take no responsibility for assisting in resolving the difficulty.

During the course of shop order 340, which carried the defendant's contracts, the defendant requested certain changes in the tail structure, or empennage, of the Dolphin, to facilitate landing in rough water. Shop order 380, for nine commercial planes for another purchaser, was progressing through plaintiff's plant concurrently with shop order 340, and as the first plane in shop order 380 was in a more advanced stage of construction than any of the planes on shop order 340, the redesigning and experimental work on the empennage was largely carried out on it. The development cost was carried on that shop order and none of it was allocated to shop order 340. Plaintiff proposes to allocate that cost by adding the total empennage costs on the two shop orders and dividing by the number of planes so as to make each plane in the two shop orders bear an equal amount of that cost. Since all the planes under the two orders were substantially similar, we think that method of computation is permissible, under the circumstances of this case. The empennage costs on both shop orders totalled $294,189.89. Allocating this amount proportionately to the number of planes in each group increases the cost of shop order 340 by $27,782.50.

We conclude, therefore, that plaintiff should have been paid development costs in the amounts of $54,683.46 and $27,782.50 in addition to the direct costs. It should have been paid a total of $665,029.72 (costs plus 10%). It was paid $654,630.92 on these contracts and the defendant is withholding from it on other contracts the sum of $86,-169.03. It may therefore recover $96,567.83.

It is so ordered.

JONES, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

MORRISON CAFETERIAS CONSOLIDATED, INC., v. THE UNITED STATES

[No. 45018. Decided December 1, 1941]

On the Proofs

Capital stock tax; corporation not shown by evidence to be not engaged in business.—Where the plaintiff, a Louisiana corporation, filed a capital stock tax return for the year ended June 30, 1934, reporting $720,000 as the value of its entire capital stock and showing no tax liability and claiming exemption from the capital stock tax on the ground that it was a nonoperating holding company not carrying on or doing any business during any part of the taxable year; and where plaintiff filed a similar return for the year 1935, reporting $733,412.75 as the value of its entire capital stock and a tax liability of $733, and claiming exemption likewise on the above-stated grounds; and where, on March 14, 1936, plaintiff filed its so-called "amended" capital stock tax return for the year 1934 reporting a nominal sum of one dollar as the value of its entire capital stock; and where there is no evidence in the record to show that the plaintiff was not engaged in carrying on or doing business during the years in question, which is the essential basis of the levy and assessment of the tax; it is *held* to be presumed that business was carried on by it and that it was accordingly subject to the tax.

Same; tax returns.—The documents filed by plaintiff on regulation forms were either returns within the meaning of the law or were something not required by the law; there is no such classification as "no tax returns" or "exemption" returns.

Same; "first" return.—The so-called corrected or "amended" return, which was filed long after the due date of a return for either of the years in question, was not a "first" return within the meaning of the statutes.

The Reporter's statement of the case:

Mr. B. Bayard Strell for the plaintiff.

Mr. John A. Rees, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows, pursuant to the stipulation of the parties:

1. Plaintiff is now, and was at all times hereinafter mentioned, a domestic corporation duly organized and created

in June 1928 under and by virtue of the laws of the State of Louisiana, with its principal office and business address in the City of New Orleans, Louisiana.

2. On August 30, 1934, plaintiff filed with the Collector of Internal Revenue for the District of Louisiana a capital stock tax return for the year ended June 30, 1934, reporting thereon $720,000 as the value of its entire capital stock and no tax due by reason of a claimed exemption. Plaintiff simultaneously filed a Treasury form 717 claiming exemption from any liability for capital stock tax upon its return for the stated reason that it was a nonoperating holding company not carrying on or doing any business during any part of the taxable year.

Pursuant to an extension granted by the Commissioner of Internal Revenue plaintiff timely filed on August 30, 1935, a capital stock tax return for the year ended June 30, 1935, reporting thereon $733,412.75 as the value of its entire capital stock and a tax liability of $733. Simultaneously therewith plaintiff filed a Treasury form 717 claiming exemption from any liability for the capital stock tax shown upon this return for the stated reason that it was a nonoperating holding company not carrying on or doing any business during any part of the taxable year.

Plaintiff filed with the Commissioner of Internal Revenue on March 14, 1936, its so-called "amended" capital stock tax return for the year 1934 reporting thereon a nominal sum of one dollar as the value of its entire capital stock.

3. Numerous conferences were held between representatives of the plaintiff and of the Commissioner of Internal Revenue which finally culminated in a denial by the Commissioner of plaintiff's claims for exemption from profits tax liability for the years ending June 30, 1934 and 1935.

Thereafter, the Commissioner of Internal Revenue timely made assessments of federal capital stock tax in the sum of $720 with accrued interest thereon of $100.37 and $733, with accrued interest thereon of $53.50 for the years 1934 and 1935, respectively. The aggregate amounts of $820.37 and $786.50 were paid by the plaintiff upon statutory notice and demand to the Collector of Internal Revenue for its District on October 26 and December 3, 1936, respectively.

4. Plaintiff filed separate formal claims for refund on June 28, 1937, of the sums paid as stated in the preceding paragraph. Each claim set forth as grounds a statement that the plaintiff was a holding corporation and as such it was not engaged in the carrying on or doing of business and further stated in substance that the Commissioner of Internal Revenue had wrongfully used the declared values of $720,000 and $733,412.75 for its capital stock as the base for computing the taxes which had been assessed and paid. As a part of this ground, it was further claimed that the Commissioner should have used a valuation of $1 as set forth in the "corrected" or "amended" capital stock tax return filed March 14, 1936, for the year 1934. Plaintiff's claims for refund were formally disallowed and rejected in full by the Commissioner of Internal Revenue and plaintiff so advised by a registered letter dated December 13, 1937.

There is no evidence tending to show that the plaintiff was not, at the time involved, engaged in carrying on or doing any business.

The court decided that the plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the Court:

This suit is begun to recover $1,606.87 plus interest. The principal sum is alleged to have been erroneously and illegally collected as capital stock tax for the taxable years ended June 30, 1934 and 1935. Claims for refund were duly filed stating (1) that plaintiff was exempt from tax as a holding corporation not engaged in carrying on or doing business during either of the years in suit, and (2) that the taxes in controversy were improperly computed upon the declared value reported by plaintiff in its return.

The defense is that the record facts do not support the alleged cause of action.

It seems to be conceded that the plaintiff is a domestic corporation and during the fiscal years involved was a parent corporation of a group embracing eight other corporations operating cafeterias in the States of Alabama, Florida, Georgia, Louisiana, and Mississippi.

On August 30, 1934, plaintiff filed a capital stock tax return for the taxable year ended June 30, 1934, reporting thereon $720,000 as the value of its entire capital stock and no tax due by reason of a claimed exemption. Plaintiff simultaneously filed a formal claim for exemption from any liability for capital stock tax upon its return for the stated reason that it was a nonoperating holding company not carrying on or doing any business during any part of the taxable year.

On August 30, 1935, plaintiff filed a capital stock tax return for the taxable year ended June 30, 1935, reporting thereon $733,412.75 as the value of its entire capital stock and a tax liability of $733. Simultaneously therewith, plaintiff filed a formal claim for exemption similar to that which it had filed for the preceding taxable year.

Plaintiff's returns filed on August 30, 1934, and August 30, 1935, as stated above, were timely filed within the statutory period as extended by the Commissioner of Internal Revenue.

On March 14, 1936, plaintiff filed with the Commissioner of Internal Revenue a so-called "amended" capital stock tax return for the year 1934, reporting thereon a nominal sum of $1 as the value of its entire capital stock.

After conferences between representatives of the plaintiff and of the Commissioner of Internal Revenue, its claims for exemption were denied and timely assessments of Federal capital stock tax were made in the sum of $720 with accrued interest thereon of $100.37 for the taxable year 1934, and $733 with accrued interest of $53.50 for the year 1935. The aggregate amounts of $820.37 and $786.50 were paid by the plaintiff upon statutory notice and demand to the Collector of Internal Revenue on October 26, and on December 3, 1936, respectively.

Plaintiff filed separate formal claims for refund on June 28, 1937, of the sums paid as stated in the preceding paragraph. Each claim set forth as grounds a statement that the taxpayer was a holding corporation and as such it was not engaged in the carrying on or doing of business and further stated in substance that the Commissioner of In-

ternal Revenue had wrongfully used the declared values of $720,000 and $733,412.75 for its capital stock as the base for computing the taxes which had been assessed and paid. As a part of this ground, it was further claimed that the Commissioner should have used a valuation of $1 as set forth in the "corrected" or "amended" capital stock tax return filed March 14, 1936, for the year 1934. Plaintiff's claims for refund were formally disallowed and rejected in full by the Commissioner of Internal Revenue and plaintiff so advised by a registered letter dated December 13, 1937.

The argument of plaintiff is based upon the assumption that the returns first filed for each of the years in suit were not taxable returns and refers to them as either "no tax" returns or "exemption" returns. It contends that the value of $1 declared in the "amended" return is the proper basis for any calculation while its correct capital stock tax liability for both of the taxable years in suit.

An extension had been granted which made the returns filed August 30, 1934, and August 30, 1935, filed in time. The claims for refund also were timely filed and the suit was begun on December 12, 1939, which was within two years after December 13, 1937, which was the date of the Commissioner's rejection letter.

The plaintiff in argument says that the documents which plaintiff first filed for each of the years in suit were either "no tax" returns or "exemption" returns. There is no such classification in the law or any descriptive legal terms. The documents were either returns within the meaning of the law or were something not required by the law.

It seems to be conceded that both of the returns were prepared on the Treasury Department form 707 printed for the use of corporations required to make and file a return for capital-stock taxes and that in the case of the return for 1934 the form as filed was completely filled out with the sole exception of lines 11 and 14 showing computation of the tax due. The document filed August 30, 1935, was fully complete even to the computation of the tax liability in the sum of $733. The return first filed may have been incomplete in that it failed to compute the tax, but this does not

render it no return whatever. *Germantown Trust Company* v. *Commissioner*, 309 U. S. 304, 310.

The so-called corrected or "amended" return filed March 14, 1936, was filed long after the due date of a return for either of the years in question and cannot be said to be "first" return within the meaning of the statutes. It was, therefore, of no effect.

The defendant's attorney asserts in argument that the claim of exemption has been abandoned, but we find nothing in the record to that effect although the plaintiff in its reply argument makes no denial. It is not necessary, however, that we should determine this matter. Under familiar principles, the assessment made by the Commissioner is presumed to be valid and supported by the facts until the contrary is shown. There is no evidence whatever to show that the plaintiff was not engaged in carrying on or doing business and as this is the essential basis of the levy and assessment of the tax, we must presume that business was in fact carried on by it and it was subject to the tax. The return made for the taxable year ending June 30, 1934, was the "first" return which under the statute as it then stood could not be amended.

It follows that plaintiff's petition must be dismissed and it is so ordered.

JONES, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

WARNER U. HINES v. THE UNITED STATES

[No. 45026. Decided December 1, 1941]

On the Proofs

Pay and allowances; effective date of retirement of Navy officer.—Following the decisions in *Butler* v. *United States*, 91 C. Cls. 88, and similar cases cited, it is *held* that the plaintiff, an officer in the Navy, was retired as of the date fixed in the order of the President and is accordingly entitled to recover.

The Reporter's statement of the case:

Mr. Fred W. Shields for the plaintiff. *King & King* were on the briefs.

Mr. Elihu Schott, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Miss Stella Akin* was on the brief.

The court made special findings of fact as follows:

1. June 7, 1919, plaintiff was commissioned an ensign in the United States Navy; was promoted to lieutenant, junior grade, June 7, 1922, and to lieutenant, June 7, 1925. He served continuously on active duty as a commissioned officer from June 7, 1919, to August 1, 1936.

2. April 24, 1936, pursuant to orders issued by the Secretary of the Navy, plaintiff appeared before a Naval Retiring Board, which determined that he was incapacitated for active service by reason of arterial hypertension, moderate enlargement of the heart, and chronic nephritis; that his incapacity was permanent and incident to the service.

3. The proceedings and findings of the Naval Retiring Board were forwarded to the Secretary of the Navy, who transmitted them to the President May 26, 1936, with the recommendation that they be approved and that plaintiff be retired from active service on August 1, 1936, and placed on the retired list in conformity with the provisions of the United States Code, Title 34, Section 417. May 27, 1936, the President approved the findings of the Naval Retiring Board and the recommendation of the Secretary of the Navy.

4. June 8, 1936, the Chief of the Bureau of Navigation advised plaintiff as follows:

> 1. The Naval Retiring Board before which you appeared found you incapacitated for active service by reason of arterial hypertension, moderate enlargement of the heart, and chronic nephritis; that your incapacity is permanent, and is incident to the service.
>
> 2. The President of the United States, under date of 27 May, 1936, approved the proceedings and findings of the Naval Retiring Board in your case, and on 1 August,

1936, you will, in accordance with his direction, regard yourself as having been transferred to the retired list of officers of the Navy from that date, in conformity with provisions of U. S. Code, Title 34, Section 417.

3. The Bureau regrets that your disabilities have interrupted your career of active service.

4. Acknowledgment of receipt is requested.

5. Plaintiff completed 17 years' service for pay purposes on June 7, 1936. He received active duty pay, based on 15 years' service, at the rate of $250 a month from May 27 to June 6, 1936, inclusive, and at the rate of $312.50 a month, based on 17 years' service, from June 7 to July 31, 1936, inclusive. The increased active duty pay received by him from June 7 to July 31, 1936, was deducted by the Comptroller General from plaintiff's pay which accrued from April 1 to June 30, 1938, on the ground that his retirement became effective May 27, 1936, the date on which the President approved the findings of the Naval Retiring Board, and not on August 1, 1936, the date on which, under the President's order, his retirement became effective.

Plaintiff received retired pay, based on 17 years' service, at the rate of $234.38 a month, from August 1, 1936, to September 30, 1937, but the Comptroller General deducted from plaintiff's pay which accrued from April 1 to June 30, 1938, the difference between the amount received by him and $187.50 a month, applicable to an officer of his rank retired after 15 years' service.

During the period of this claim prior to August 1, 1936, plaintiff was paid rental allowance for three rooms and one subsistence allowance a day as an officer without dependents, which rates were applicable to plaintiff's rank after 15 or 17 years' service.

6. If it should be held that plaintiff is entitled to active duty pay and allowances based upon all service performed by him prior to August 1, 1936, the date of his transfer to the retired list, there would be due him for the period from May 27 to July 31, 1936, inclusive, the difference in active duty pay between $312.50 a month, applicable to a lieutenant, U. S. Navy, with over 17 years' service, and $250 a month received by him as an officer of that rank with over 15 years' service, from June 7, 1936, to July 31, 1936, one

month and 24 days at $62.50 a month, or $112.50. If held entitled on and after August 1, 1936, to retired pay based on all services performed prior to August 1, 1936, he would be entitled to the difference in retired pay between $234.375 a month, applicable to a lieutenant, U. S. Navy, retired after 17 years' service, and $187.50, retired pay received by him as an officer of that rank after 15 years' service, from August 1, 1936, to September 30, 1939 (the date of the latest available roll in the General Accounting Office), three years and two months at $46.875 a month, or $1,781.25. This is a continuing claim.

The court decided that the plaintiff was entitled to recover.

Opinion *per curiam:* There is no dispute about the facts in this case as set forth in the special findings of fact.

Plaintiff is a naval officer who was found by a Naval Retiring Board to be incapacitated for active service. The Secretary of the Navy presented the findings to the President with the recommendation that they be approved and that plaintiff be retired from active service and placed on the retired list August 1, 1936. The President, on May 27, 1936, approved the findings of the Retiring Board and the recommendation of the Secretary of the Navy.

The sole question in this case is—on which of the two dates above-mentioned was plaintiff actually retired.

The same question was decided by this court in the case of *James A. Greenwald, Jr.* v. *United States*, 88 C. Cls. 264; *Charles G. Wadbrook* v. *United States*, 90 C. Cls. 480; and *Henry M. Butler* v. *United States*, 91 C. Cls. 88.

In the *Butler case, supra*, the identical order was considered and decided. The instant case is controlled by the decisions in those cases. Under the holdings of the cases cited, plaintiff was retired on August 1, 1936, the date on which the President directed he should be transferred to the retired list, and judgment is rendered for the plaintiff accordingly. The claim, however, is a continuing one and entry of judgment will be suspended pending receipt of a report from the General Accounting Office of the amount due plaintiff in accordance with this opinion.

It is so ordered.

WILLIAM E. REYNOLDS v. THE UNITED STATES

[No. 45055. Decided December 1, 1941]

On the Proofs

Pay and allowances; commandant of the Coast Guard placed on retired list; Act of January 12, 1923.—Where plaintiff after more than 40 years' service as a commissioned officer of the Coast Guard was placed on the retired list January 11, 1924, at which time he was Commandant of the Coast Guard with the rank and active duty pay of a rear admiral (lower half) of the Navy; it is *held* that plaintiff at the time of his retirement was entitled under the Act of January 12, 1923 (42 Stat. 1130), and other relevant statutes, to the retired pay of one grade above that held by him at the time of retirement, and accordingly plaintiff is entitled to recover.

Same; conflicting provisions in same statute.—Where there are two provisions in the same statute relating to the same matter and the language of the two provisions gives rise to a doubt, such doubt will be resolved in favor of the later expression in the statute.

Same; special provision.—Section 3 of the Act of January 12, 1923, was a special provision and related to a special class of officers, which included plaintiff, notwithstanding plaintiff was serving as Commandant of the Coast Guard at the time of his retirement, and notwithstanding that section 2 of said act was a general provision relating to the retirement of any officer while serving as Commandant, which section 2, except for the provisions of section 3, would have applied to any officer upon reaching 64 years of age whether he had served 40 years or not.

Same; Act of June 9, 1937.—The Act of June 9, 1937, amending the first proviso of section 2 of the Act of January 12, 1923, did not take away any rights granted to a retiring officer of the Coast Guard by the Act of 1923, but only granted additional rights.

Same; Act of June 25, 1936.—The Act of June 25, 1936, amending section 2 of the Act of January 12, 1923, left unmodified and undisturbed the provisions of section 3 of said 1923 Act.

Same; section 2, Act of June 9, 1937.—The amendment made by section 2 of the Act of June 9, 1937, to section 3 of the Act of January 12, 1923, did not take away anything that had been previously granted but simply granted additional rights to a retiring captain of the Coast Guard.

The Reporter's statement of the case:

Mr. Leo A. Rover for the plaintiff.

Miss Stella Akin, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

Plaintiff seeks to recover additional retired pay in the amount of $1,500 per annum from January 1, 1934, a date six years prior to filing of the petition.

Plaintiff claims that under the act of January 12, 1923, 42 Stat. 1130, and other statutes relating to retirement of officers of the Coast Guard, he was and is entitled to retired pay based on the active-duty pay of one grade above that actually held by him at the time of his retirement. The Government refused to give him retired pay on that basis, and counsel for defendant insists that decision was correct.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff was born January 11, 1860. He enrolled as a cadet in the United States Revenue-Marine Service, later changed to the United States Revenue-Cutter Service, and, in 1915, to the United States Coast Guard. June 17, 1880, he was commissioned a third lieutenant in the service.

Plaintiff was on active continuous service as a member of the Coast Guard from May 22, 1878, to January 11, 1924, a period of about 45 years, 7 months, and 17 days. He was on active continuous service as a commissioned officer in the Coast Guard from June 17, 1880, to January 11, 1924, a period of 43 years, 6 months, and 24 days.

2. Plaintiff was successively promoted through the various grades in the service from third lieutenant to commandant. He was on active duty at various stations in the Coast Guard, including service in the Bering Sea, the Arctic Ocean, and in Alaskan Waters; and was also on the Jeannette Relief Expedition-Arctic in 1881 and served with the Navy throughout the Spanish-American War in 1898 and the World War in 1917–1921.

Plaintiff was placed on the retired list of the Coast Guard January 11, 1924, at which time and prior thereto he was Commandant of the Coast Guard with the rank and active-duty pay of a rear admiral (lower half) of the Navy, and prior to his retirement he had received various commissions of appointment to that position from the President.

September 22, 1919, plaintiff was duly appointed by the President "Captain Commandant of the Coast Guard of the United States to rank as such from the date of oath. This commission to continue in force during the term of four years." The date of the oath was October 2, 1919.

December 19, 1919, the President issued plaintiff the following commission:

> Reposing special trust and confidence in the patriotism, valor, integrity, and abilities of William Edward Reynolds, Captain Commandant, U. S. Coast Guard, I have nominated, and by and with the advice and consent of the Senate do appoint him to have temporarily the rank of Commodore in the Navy and Brigadier General in the Army in the Coast Guard of the United States, to rank as such from the second day of October, 1919.
>
> This commission to continue in force during the pleasure of the President of the United States for the time being.

January 17, 1923, the President issued a commission of appointment to plaintiff "to the rank of Rear Admiral during the remainder of his term of office as Commandant in the Coast Guard of the United States, under his existing appointment thereto, to rank as such from the twelfth day of January, 1923. This commission to continue in force during the pleasure of the President of the United States for the time being."

September 17, 1923, the President issued a commission to plaintiff in which plaintiff was appointed "Commandant with the rank of Rear Admiral, in the Coast Guard of the United States, to rank as such from the second day of October, 1923."

January 4, 1924, the President issued to plaintiff a commission appointing him "Commandant, with the rank of Rear Admiral, in the Coast Guard of the United States, to rank as

such from the second day of October, 1923. This commission to continue in force during the pleasure of the President of the United States for the time being."

3. Plaintiff, while on active service as commandant in the United States Coast Guard, prior to and on January 11, 1924, drew the pay of a rear admiral (lower half) of the Navy—namely, $6,000 per anum. Upon his retirement January 11, 1924, after having served more than forty years, and since that time he was allowed and has received the retired pay of only 75 per centum of his active-duty pay of $6,000, or $4,500 per annum.

The pay of either a rear admiral (upper half) or a vice admiral of the Navy on active duty was at the time plaintiff was retired and has ever since been $8,000 per annum, and the retirement pay of either official is $6,000 per annum.

If at the time of his retirement plaintiff was entitled under the Act of January 12, 1923, 42 Stat. 1130, and other relevant statutes, to the retired pay of one grade above that held by him at the time of retirement, he was entitled to receive and is here entitled to recover additional retired pay of $1,500 per annum.

4. January 11, 1924, plaintiff reached the statutory retirement age of 64 years and on that date the Secretary of the Treasury, with the approval of the President, transferred plaintiff to the retired list of officers of the Coast Guard. The Secretary of the Treasury advised plaintiff that on and after that date he would have the rank of commandant of the Coast Guard and the retired pay of rear admiral (lower half) of the Navy on the retired list. Plaintiff applied to the Secretary of the Treasury for an increase in his retired pay on the basis of one rank and grade above that held by him at the time of his retirement, to wit $1,500 per annum, on the ground that he had served continually for more than forty years and was therefore entitled to such retired pay under section 3 of the Act of January 12, 1923. This application was refused by the Secretary of the Treasury on an opinion rendered by the Comptroller General against plaintiff's claim.

The court decided that the plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiff claims that under section 3 of the Act of January 12, 1923, 42 Stat. 1130, when that section is interpreted in the light of the entire act and in the light of other relevant statutes, he was and is entitled to additional retired pay of $1,500 per annum inasmuch as that section provided that when a commissioned officer of the Coast Guard who has had forty years' service shall retire he shall be placed on the retired list with the rank and retired pay of one grade above that actually held by him at the time of retirement. Plaintiff insists that this was a special provision for the benefit of all commissioned officers of the Coast Guard who had long service and is consistent with the provisions in section 2 of the same act, upon which the defendant relies, which relate generally, and without reference to length of service, to the retired rank and pay of a commandant of the Coast Guard.

On the other hand counsel for defendant insists that section 2 of the Act of January 12, 1923, *supra*, was a special provision governing the rank and retired pay of *any* commissioned officer of the Coast Guard, including one who had more than forty years' service who, at the time of retirement, held a commission and was serving as commandant of the Coast Guard, having the rank and receiving the active-duty pay of a rear admiral (lower half) of the Navy. And it is argued by defendant that section 3 was a general provision relating to all commissioned officers other than commandant who had more than forty years' service prior to retiring.

The parties are not in disagreement with reference to the well-established rule relating to the interpretation of the statutes, as stated in *Rodgers* v. *United States*, 185 U. S. 83, that "* * * where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided for in the special—the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are

manifestly inconsistent with those of the special." And also as stated in *Mutual Life Insurance Company* v. *Hill*, 193 U. S. 551, 558, in which the court said:

> * * *. The ordinary rule in respect to the construction of contracts is this: that where there are two clauses in any respect conflicting, that which is specially directed to a particular matter controls in respect thereto over one which is general in its terms, although within its general terms the particular may be included. Because when the parties express themselves in reference to a particular matter the attention is directed to that, and it must be assumed that it expresses their intent, whereas a reference to some general matter, within which the particular may be included, does not necessarily indicate that the parties had the particular matter in thought. * * * The special controlled the general; that which must have been in the minds of the contracting parties controls that which may not have been, although included within the language of the latter stipulation. This is the general rule in the construction of all documents—contracts as well as statutes.

It is also the rule of statutory interpretation that where there are two provisions in the same statute relating to the same matter and the language of the two sections or provisions gives rise to a doubt, or is in any way conflicting, the doubt will be resolved in favor of the later expression in the statute for the reason that it must be presumed that the Congress had the earlier provision in mind when writing the later provision and would, if it had intended that the earlier provision be an exception to the later one, have inserted an exception or so provided to that effect.

We are of opinion, as we shall hereinafter attempt to show, that section 3 of the Act of January 12, 1923, *supra*, was a special provision and related to a special class of officers which included plaintiff, notwithstanding plaintiff was serving as commandant at the time of his retirement, and that section 2 of the act was a general provision relating to the retirement of any officer while serving as commandant, which, except for the provisions of section 3, would have applied to any officer upon reaching 64 years of age whether he had served forty years or not.

A rather detailed statement with reference to the provisions of sections 1, 2, and 3 of the Act of January 12, 1923, is necessary to a clear understanding of the question presented. The Act of January 12, 1923, *supra*, was entitled "An Act To distribute the commissioned line and engineer officers of the Coast Guard in grades, and for other purposes."

Section 1 provided that the number of permanent commissioned line officers of the Coast Guard authorized by law should be distributed in grades of one commandant, seven captains, twelve commanders, thirty-five lieutenant commanders, thirty-seven lieutenants, and seventy-seven lieutenants (junior grade) and ensigns; that the number of permanent commissioned engineer officers authorized by law should be distributed in grades of one engineer in chief, three captains (engineering), six commanders (engineering), twelve lieutenant commanders (engineering), twenty-two lieutenants (engineering), and forty-two lieutenants (junior grade) (engineering) and ensigns (engineering); that promotions to the grades created by that act, namely, captain, captain (engineering), and commander (engineering) should be made from the next lower grade by seniority. Then followed a proviso that lieutenants and lieutenants (junior grade), both line and engineering, might be promoted, subject to examination as provided by law, without regard to the number or length of service in grade, to such grades in the Coast Guard not above lieutenant commander or lieutenant commander (engineering) as correspond to the permanent ranks and grades that may be attained in accordance with law by line officers of the Regular Navy of the same length of total commissioned service, and officers thus promoted should be extra numbers in their respective grades, which extra numbers should not at any one time exceed twenty lieutenant commanders, fifteen lieutenants, fifteen lieutenant commanders (engineering) and eight lieutenants (engineering), but that no officer should be promoted under this proviso who would thereby be advanced in rank ahead of an officer in the same grade and corps whose name stood above his on the official precedence list. There was a further proviso that captains and captains (engineering) should have the rank of, and be of corresponding grade to, captains in the Navy, and com-

manders (engineering) should have the rank of, and be of the corresponding grade to, commanders in the Navy.

Section 2 upon which defendant relies, is quoted in full:

> That the title of captain commandant in the Coast Guard is hereby changed to commandant. Hereafter the commandant shall be selected from the active list of line officers not below the grade of commander and shall have, while serving as commandant, the rank, pay, and allowances of a rear admiral (lower half) of the Navy: *Provided*, That any officer who shall hereafter serve as commandant shall, when retired, be retired with the rank of commandant and with the pay of a rear admiral (lower half) of the Navy on the retired list, and that an officer whose term of service as commandant has expired may be appointed a captain and shall be an additional number in that grade; but if not so appointed, he shall take the place on the lineal list in the grade that he would have attained had he not served as commandant and be an additional number in such grade: *Provided further*, That the engineer in chief, while so serving, shall have the rank, pay, and allowances of a captain (engineering) in the Coast Guard, and hereafter the engineer in chief shall be selected from the active list of engineer officers not below the grade of lieutenant commander (engineering): *And provided further*, That an officer who shall hereafter serve as engineer in chief shall, when retired, be retired with the rank of engineer in chief and with the pay of a captain (engineering) on the retired list, and that an officer whose term of service as engineer in chief has expired may be appointed a commander (engineering) and shall be an additional number in that grade; but if not so appointed, he shall take the place on the lineal list in the grade that he would have attained had he not served as engineer in chief and be an additional number in such grade: *And provided further*, That a constructor, after ten years' commissioned service in the Revenue-Cutter Service and Coast Guard, shall have the rank, pay, and allowances of a lieutenant commander, and after twenty years' commissioned service the rank, pay, and allowances of a commander.

A study of section 2 shows that in it Congress was dealing generally with two of the highest commissioned positions in the Coast Guard—to wit, commandant and engineer in chief—and the promotion to the position of commandant of a captain or a commander with the rank and active-duty pay

and allowances, while so serving, of a rear admiral (lower half) of the Navy. The Congress was further dealing generally with the retired rank and pay of *any* officer without regard to length of service who should thereafter serve as commandant of the Coast Guard. It seems clear that no thought was being given in this section to any right or privilege of commissioned officers to additional rank and compensation by reason of length of service upon retirement while so serving as commandant or engineer in chief. In this connection it should be noted that the first proviso of section 2 dealt not only with the retired rank and pay of any officer serving as commandant and retiring while so serving, but it also dealt with the rank and grade to which such officer should be appointed upon expiration of his service as commandant. The second proviso of section 2 related to the engineer in chief who, while so serving, was to have the rank, pay, and allowances of a captain (engineering) in the Coast Guard, and, like the first portion of section 2 preceding the first proviso, it was provided that such engineer in chief should be selected from the active engineer officers holding the rank and grade of commander or lieutenant commander (engineering), which was one or two ranks and grades, respectively, below that of captain. The third proviso, relating to any officer serving as engineer in chief, required, in conformity with what had been provided with reference to the commandant, that such officer be retired with the rank of engineer in chief and with the pay of a captain on the retired list. This third proviso likewise specified that if an officer promoted to engineer in chief did not become eligible for retirement until after the termination of his term of service as such engineer in chief, he should be appointed a commander, which was the next lower grade, notwithstanding he may have been a lieutenant commander at the time of his appointment as engineer in chief.

Section 4 of the existing law, Act of April 12, 1902, 32 Stat. 100, provided that "when any officer in the Revenue Cutter Service [changed in 1915 to Coast Guard] has reached the age of sixty-four years he shall be retired by the President from active service."

From what has been said, it is plain that section 2 was a general rather than a special provision applying in general terms to the appointment of any officer of the grades mentioned to the positions of commandant and engineer in chief, and to the retirement and the retired rank and pay of such officers while holding such positions upon reaching the age of sixty-four years, regardless of the number of years they had served. In the absence of any further provision in the statute with reference to retired rank and pay by reason of length of service, it is obvious that under the provisions of section 2 plaintiff would have received only the retired pay of a rear admiral (lower half) of the Navy, which was three-fourths of $6,000.

A study of the language of section 2 further convinces us that the first proviso of the section relating to the retirement of a commandant was intended primarily and wholly to prevent an officer upon reaching the age of 64 and while serving as commandant from being retired in the rank and grade in which he was serving at the time of his promotion to commandant and to remove any doubt that might arise in that connection because of the statement immediately preceding the proviso that the commandant should be selected from the active list of captains or commanders "and shall, *while so serving as commandant*, have the rank, pay and allowances of a rear admiral (lower half) of the Navy." [Italics ours.] In view of this language, an officer reaching the compulsory retirement age of sixty-four while serving as commandant might not have been entitled to three-fourths of the pay of a rear admiral (lower half) since after retirement he would not be "serving as commandant." To remove all doubt as to this and to fix the rank and grade of an officer whose term of service as commandant ended before he reached the age of retirement, the first proviso of section 2 was inserted. The third proviso had the same purpose and did the same with reference to the engineer in chief. Cf. *Remey* v. *United States*, 33 C. Cls. 218. These provisos did not, therefore, preclude such commissioned officers from receiving the full benefit of any subsequent special provision in the act based on length of service to which they might be entitled.

Section 3 of the Act of January 12, 1923, supra, provided in full as follows:

> That hereafter no commissioned officer of the Coast Guard shall be promoted to a higher grade or rank on the active list, *except to commandant or to engineer in chief*, until his mental, moral, and professional fitness to perform all the duties of such higher grade or rank have been established to the satisfaction of a board of examining officers appointed by the President, and until he has been examined by a board of medical officers and pronounced physically qualified to perform all the duties of such higher grade or rank: *Provided*, That if any commissioned officer shall fail in his physical examination for promotion and be found incapacitated for service by reason of physical disability contracted in the line of duty, he shall be retired with the rank to which his seniority entitled him to be promoted: *Provided further*, That hereafter when a commissioned officer of the Coast Guard who has had forty years' service shall retire, he shall be placed on the retired list with the rank and retired pay of one grade above that actually held by him at the time of retirement; and, in the case of a captain, the rank and retired pay of one grade above shall be the rank of commodore and the pay of a commodore in the Navy on the retired list. (Italics ours.)

It should be noted that the commandant and the engineer in chief are specifically mentioned in this section. First, this section deals with the matter of examination for promotion of all commissioned officers of the Coast Guard to a higher grade or rank on the active list, except to the commandant or to the engineer in chief; second, to the matter of promotion on the active list for retirement purposes of any commissioned officer found incapacitated for service by reason of physical disability contracted in line of duty; and third, and finally, to the unqualified right of any commissioned officer of the Coast Guard who has had forty years' service to be placed on the retired list with the rank and retired pay of one grade above that actually held by him at the time of retirement. The retirement right granted by section 3, both as to grade and pay based on length of service, is a special provision carved out of the entire act and relates only to a special class of commissioned officers of the Coast Guard, whether or not, at the time of retirement, they are serving as commandant or engineer

in chief. There is no basis for argument that there is any exception in section 3 which would exclude from its benefits an officer who has had more than forty years' service merely because he was holding a commission and was serving at the time of his retirement as commandant with the rank and active-duty pay of a rear admiral (lower half) of the Navy, or as engineer in chief with the rank and active-duty pay of a captain in the Coast Guard. We cannot engraft upon the plain language of section 3 an exception which would materially change its meaning and purpose, as plainly disclosed by the language used. *Leys* v. *United States*, 80 C. Cls. 235, 239. The provision is mandatory and leaves nothing to be determined, except whether or not the officer being retired has had forty years' service. The right given by section 3 to those commissioned officers who had served forty years at the time of retirement was remedial and plainly in addition to the rights expressly granted by section 2 to officers who might be appointed and serve as commandant or engineer in chief. It should be liberally interpreted and applied. *United States* v. *Landram*, 118 U. S. 81, 85; *American Tobacco Co.* v. *Werckmeister*, 207 U. S. 284; *United States* v. *Colorado Anthracite Co.*, 225 U. S. 219, 223; *Delaney* v. *United States*, 31 C. Cls. 44, 61–164 U. S. 282.

In the first part of section 3 Congress excepted from examination a captain or a commander being promoted to commandant, or a commander or a lieutenant commander being promoted to engineer in chief, and we think it is clear that if Congress had intended to except these officers from the rights and privileges expressly given in the provision which immediately followed it would have used language to express that purpose sufficiently clear so as not to be misunderstood. See Act of June 29, 1906, 34 Stat. 553, 554. Moreover the last clause of the second proviso of section 3 expressly supports our interpretation. That clause provided that "* * * in the case of a captain [the engineer in chief was a captain], the rank and retired pay of one grade above shall be the rank of commodore and the pay of a commodore in the Navy on the retired list." This was later changed, as will hereinafter appear, and a captain was retired as a rear admiral (lower half). Under the quoted provision it is obvious that

an engineer in chief who held the rank of captain and received the active-duty pay of a captain, would, if he retired while so serving as chief engineer, receive the rank and pay of a commodore of the Navy on the retired list which, for retirement purposes, was one rank and grade in pay above that of captain in the Navy.

Why did Congress insert this clause in the second proviso of section 3? Why was a captain specifically mentioned and the commandant holding the rank and receiving active-duty pay of a rear admiral (lower half) not mentioned? We think the answers to these questions are plain and, when given, show that Congress had in mind and intended that *any* commissioned officer of the Coast Guard, including those officers serving as commandant and engineer in chief, should have the retirement benefits granted if, at the time of retirement, they had forty years' service to their credit.

The answer to the first question is that Congress inserted the clause in the second proviso of section 3 because the next rank above captain on the active list in the Navy was the rank of rear admiral (lower half), but, under existing law (Act of 1899, 30 Stat. 1004, and subsequent acts), there was the rank and grade of pay of commodore in the Navy *for retirement purposes only*. The rank and pay of a commodore in the Navy on the active list had been abolished, but it was an existing rank in 1923 for retirement purposes for the benefit of those officers on the active list of the Navy who, because of the nature of the service rendered by them prior to retirement, were under separate statutory provisions entitled to be retired in the next higher rank and with the retired pay fixed for a commodore on the retired list.

The answer to the first part of the second question above, as to why a captain in the Coast Guard was specifically mentioned in the second proviso of Section 3, is that inasmuch as captains in the Coast Guard, both of line and engineering, who had the rank and were of corresponding grade to captains in the Navy would not come within the provisions of existing law entitling a captain in the Navy to be retired with the rank and pay of a commodore on the retired list it was necessary for Congress to make the rank and pay of a

commodore in the Navy on the retired list applicable to a captain in the Coast Guard.

Section 9, Act of March 3, 1899, 30 Stat. 1004, relating to retirement of officers in the Navy, provided in the last proviso therein that "* * * any officer retired under the provisions of this section shall be retired with the rank and three-fourths the sea pay of the next higher grade, including the grade of commodore, which is retained on the retired list for this purpose."

Other statutes relating to the Navy only and to the right of certain naval officers to be retired with the rank of commodore on the retired list of the Navy and those statutes relating to the Navy which provide for the retirement of a captain of the Navy under certain circumstances with the rank and retired pay of a rear admiral (lower half) of the Navy need not be referred to. It is sufficient to say that it seems clear that Congress considered these statutes when inserting the last clause of the second proviso of section 3 of the Act of January 12, 1923. A further reason was given by the Committee on Interstate and Foreign Commerce of the House of Representatives in House Report No. 934, which accompanied the bill which became the Act of January 12, 1923, as follows:

> Having in mind the limitation in opportunity for advancement, as compared with that existing in the Army, Navy, and Marine Corps, that will exist in the Coast Guard *even under the terms of this bill*, it is thought that a *commissioned officer*, who has served his country faithfully for 40 years should, when retired, have the privilege of retiring in the next higher grade.
>
> The grade next above captain in the Coast Guard will be, under the terms of this bill, that of commandant. A captain of over forty years' service, but who has never in fact served as commandant, should not have on the retired list the title of commandant; hence, such an officer, under the language in section 3, would have the rank of commodore. *The pay of a commodore in the Navy on the retired list is the same as that of a rear admiral (lower half) on the retired list.* (Italics ours).

When enacting the second proviso of section 3 we think it is clear that Congress was thinking of and intending to make

provision for retirement of the engineer in chief holding the rank and receiving the pay of a captain on the active list, and the commandant holding the rank and receiving the pay on the active list of a rear admiral (lower half) with the rank and retired pay of one grade above that held by them at time of retirement.

The answer to the second part of the question stated above, as to why the commandant holding the rank and receiving the active-duty pay of a rear admiral (lower half) in the Coast Guard was not mentioned, is that it was not necessary to mention him if he had forty years' service at the time of retirement because the rank and retired pay of one grade above that held by him, if he was retired while holding a commission as commandant, was that of vice admiral, an existing rank on the active list of the Navy with the active-duty pay of $8,000 per annum. The active-duty base pay of a rear admiral (upper half) and a vice admiral was the same. Section 8, Act of June 10, 1922, 42 Stat. 625.

We have considered the committee reports and legislative history of the Act of June 12, 1923, upon which counsel for defendant places some reliance in the argument that the first proviso of section 2 of the act specifically governs in this case over the provisions in the second proviso of section 3, but we find nothing in that legislative history which conflicts in any way with our interpretations of sections 2 and 3. On the contrary, we think the committee reports support the views hereinbefore expressed. Counsel for defendant refers to certain statements made on the floor of the Senate, pp. 150 and 161 of the Congressional Record, 67th Congress, 4th session, but the statements to which reference is made relate only to section 2 of the Act and not in any way to section 3. Our interpretation of section 2 is in conformity with what was said about that section. The committee reports and the discussion on the floor of Congress show that Congress considered section 2 of the Act to be a general section relating to all commissioned officers, regardless of length of service, who might from time to time serve as commandant or engineer in chief; and that section 3 was a separate and special provision for the sole benefit of those commissioned officers who at the time of retirement had forty years' service. The

commandant and the engineer in chief were clearly in this class if they had served forty years.

Counsel for defendant further argues that any possible doubt as to whether section 2 of the Act of January 12, 1923, *supra*, controls plaintiff's case was removed by the Act of June 9, 1937, amending the first proviso of section 2 of the original Act. But we cannot agree. The Act of 1937 did not take away any rights granted by the Act of 1923 to a retiring officer of the Coast Guard, but only granted additional rights. A study of the Act of 1937 shows that the intent and purpose of the original act with reference to the rights upon retirement of officers having less than forty years' service and of officers having forty years or more of service remained unchanged, except for the additional rights granted by the amendments.

Before discussing the provisions of the Amendatory Act of June 9, 1937, 50 Stat. 252, reference should be made to the Act of June 25, 1936, 49 Stat. 1924, which first amended section 2 of the Act of January 12, 1923, by striking out the first proviso in that section and inserting the following proviso in lieu thereof. "*Provided*, That any officer who was serving on June 1, 1936, or shall thereafter serve as commandant in the Coast Guard shall, when retired (whether before or after the date of the enactment of this Act), be retired with the rank of Commandant and with the pay of a rear admiral (upper half) of the Navy on the retired list and that an officer whose term of service as Commandant has expired may be appointed a captain and shall be an additional number in that grade, but, if not so appointed, he shall take the place on the lineal list in the grade that he would have attained had he not served as Commandant and be an additional number in such grade."

This Amendatory Act left unmodified and undisturbed the provisions of section 3 of the original act of January 12, 1923, and if the first proviso of section 2 of the original act had read exactly as it did after it was changed by the Act of June 25, 1936, our conclusion that plaintiff is correct in his claim would be the same. The proviso as amended still remained *a general provision relating to the retirement of any officer* who was serving as commandant of the Coast Guard on June

1, 1936, or who should thereafter serve as commandant. But this amended proviso must, like the original proviso, be read and interpreted in connection and consistently with other provisions of the statute contained in section 3 under the well-established rule that one part of the statute should not be lifted from its context and interpreted and applied separate and apart from the statute as a whole. The Amendatory Act of 1936 served only to grant additional retirement benefits. It did not take away any rights of retirement that had been granted under the original act of 1923. Under the Amendatory Act, an officer who retired while serving as commandant and who had, at that time, forty years' service to his credit was still entitled to the benefits of the second proviso of section 3 of the original act. The only change made by the Amendatory Act of 1936 in the original proviso of section 2 of the 1923 Act was to give an officer who had less than forty years' service at the time of his retirement while serving as commandant the retired pay of a rear admiral (upper half) of the Navy on the retired list. The only effect of this change upon the original act as a whole was to give a retiring commandant who did not have forty years' service, and who would not come under the provisions of section 3, the retired pay of one grade above the grade of pay being received by him at the time of retirement, but he was to retain the rank of commandant on the retired list. In substance, therefore, insofar as retired pay was concerned, so long as the pay of a rear admiral (upper half) and a vice admiral remained the same, the 1936 Act operated to give all officers retiring while serving as commandant the same retired pay whether they had, at the time of retirement, served forty years or not.

The Act of June 9, 1937, *supra*, referred to by counsel for defendant, provided in section 1 that section 2 of the Act of January 12, 1923, as amended by the Act of June 25, 1936, *supra*, be amended by striking out the first proviso of that section and inserting in lieu thereof the following:

> *Provided*, That any officer who has served or shall hereafter serve as commandant, if heretofore or hereafter retired, whether before or at any time after the termination of his service as commandant, shall, if receiving the pay

> of a rear admiral (upper half) at the termination of his service as commandant, be placed on the retired list with the rank and retired pay of a rear admiral (upper half), or, if receiving the pay of a rear admiral (lower half) at the termination of his service as commandant, shall be placed on the retired list with the rank and retired pay of a rear admiral (lower half), and that any officer whose term of service as commandant has expired may be appointed a captain and shall be an additional number in that grade, but, if not so appointed, he shall take the place on the lineal list in the grade that he would have obtained had he not served as commandant and be an additional number in such grade.

Section 2 of this Act of June 9, 1937, provided that section 3 of the Act of January 12, 1923, as amended by the Act of February 28, 1927 (44 Stat. 1261), be amended by striking out so much of the second proviso in that section as followed the semicolon and inserting in lieu thereof the following:

> and, in the case of a captain, the rank and retired pay of one grade above shall be the rank and retired pay of a rear admiral (lower half). Any officer of the Coast Guard now having the rank of commodore on the retired list shall hereafter have in lieu thereof the rank of a rear admiral (lower half), without any increase in pay by reason of such change in rank.

The Amendatory Act of February 28, 1927, supra, referred to in the above-mentioned section 2 of the Act of June 9, 1937, was not a change in the substance of section 3 of the Act of January 12, 1923. The 1927 Act simply amended section 3 of the 1923 Act by an additional proviso that five designated retired commissioned officers of the Coast Guard "shall have the rank of commodore on the retired list without any increase in pay by reason of the passage of this act."

What we have said above with reference to the amendment of section 2 of the Act of 1923 by the Act of June 25, 1936, applies to the above-quoted amendment of section 2 by the Act of June 9, 1937. This 1937 amendment, as did the previous one, granted additional rights. It in no way took away or limited the retirement benefits accruing under section 3 of the original act to a retiring commandant having forty years' service. A reading of the 1937 amendment of

section 2 shows that it remained a general provision and that its purpose and effect was to give an officer who had been appointed and thereafter served as commandant retired pay equal to three-fourths of the active-duty pay of a commandant, even though at the time of retirement at sixty-four years of age his term of service as commandant had expired and he had reverted to the rank and grade of a captain on the active list. In addition retired pay was granted to any officer who had theretofore served as commandant but whose service, as such, had terminated prior to retirement and who, because not having forty years' service at the time of retirement, was entitled under the original act only to the retired pay of a captain. In other words, the 1937 amendment of section 2 gave to any officer retiring with less than forty years' service who had served as commandant of the Coast Guard at any time since January 12, 1923, the retired pay based on the active-duty pay being received by him at the time of retirement if he was then serving as commandant, or increased retired pay over what he was entitled to under the 1923 Act and the 1936 amendment if he had been retired after his service as commandant had terminated.

The amendment made by section 2 of the Act of June 9, 1937, to section 3 of the Act of January 12, 1923, which was the first time the second proviso of section 3 of the original act had been changed, serves, in our opinion, to support our conclusion as to the right of all commissioned officers of the Coast Guard, including the commandant and the engineer in chief, to have the rank and receive the retired pay of one grade above that actually held by them at the time of retirement if at such time they had served forty years. The 1937 amendment of section 3 did not take away anything that had originally been given but it simply granted additional benefits of rank to a retiring captain of the Coast Guard by giving him the rank and retired pay of a rear admiral (lower half) of the Navy, if at the time of his retirement he had served forty years. Any such previously retired commissioned officer of the Coast Guard having the rank of commodore on the retired list was, by the amendment, given the rank of a rear admiral (lower half) on the retired list with-

Syllabus

out any increase in pay by reason of such change in rank. The retired pay of a commodore on the retired list and that of a rear admiral (lower half) was the same.

Plaintiff is entitled to recover and judgment will be entered upon the filing by the parties of a computation showing the amount due.

MADDEN, *Judge;* JONES, *Judge;* and WHITAKER, *Judge*, concur.

WHALEY, *Chief Justice*, concurs in the result.

On March 2, 1942, upon a report from the General Accounting Office showing the amount due under the court's decision of December 1, 1941, *supra*, judgment was entered for the plaintiff in the sum of $11,635.42.

ROBERT E. KLOTZ v. THE UNITED STATES

[No. 45432. Decided December 1, 1941]*

On Defendant's Motion To Dismiss

Jurisdiction; petition held not to comply with provisions of Title 28, section 250, U. S. Code.—It is *held* that the allegations of plaintiff's petition, being vague and indefinite, and showing no promise of payment for information alleged to have been furnished to the Government, does not set out a cause of action under the provisions of the general jurisdictional act (U. S. Code, Title 28, section 250) which gives the court jurisdiction to hear claims against the United States.

Mr. Robert E. Klotz pro se.

Mr. J. F. Mothershead, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The facts sufficiently appear from the opinion of the court.

WHALEY, *Chief Justice*, delivered the opinion of the court:

This case comes to the court on the defendant's motion to dismiss, alleging that the petition does not set out a cause

*Plaintiff's motion for leave to file amended petition allowed and amended petition filed January 14, 1942. Defendant's motion for leave to file motion to dismiss allowed and said motion filed March 7, 1942. Argued April 6, 1942, on defendant's motion to dismiss; no appearance for plaintiff.

of action against the defendant or any cause of action over which the court has jurisdiction.

An examination of the petition shows that the plaintiff alleges the suit is brought under the general jurisdictional act which gives this court the right to hear

> All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an executive department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable. U. S. Code, Title 28, Sec. 250.

The plaintiff must bring himself within the provisions of this section.

The petition then alleges:

> That commencing November 21, 1939, and through December 14, 1940, he submitted to the Navy Department devices of a certain nature, and that said devices were rejected by the Navy Department for the reason that they considered the nature of the forces involved not of a sort to accomplish the purpose of the devices, and the Navy Department stated that the idea of devices of the same general nature had been considered for "at least the last twenty years" and had been rejected for the above reason; that, whereupon, the plaintiff undertook, by an exposition of his ideas on the subject, and by reference to the proper technological literature, to convince the Navy Department that devices of the general nature in question were feasible, and to explain to the Navy Department the physical principles of their operation; that plaintiff accomplished this, through an extended and controversial correspondence with the Navy Department; that beyond this he has by his own study made, and conveyed to the Navy Department, discoveries of special and critical nature in regard to the forces in question, and these have included new and more correct and general formulations; that by reason of all of the above the Navy Department has been enabled to understand the operation of devices which it had not previously believed could function, and to confirm and ac-

curately estimate the military worth of devices it would otherwise have categorically rejected; that the Navy Department has applied the knowledge thus imparted, and especially certain of it relating to and comprising technical methods, in the improvement of devices other than plaintiff's own submitted inventions; that your petitioner has in the past demanded, in vain, of the Navy Department remuneration for information conveyed, though the Navy Department has not denied the general correctness of said information.

This is a general, sweeping, cover-all allegation without any specific statement of what is the true nature of the claim. No allegation that any provision of the Constitution, or law of Congress, or regulation of an executive department has been disobeyed and no contract, express or implied, has been broken. No allegation is made that a patent of the plaintiff has been infringed by the Government or by some one performing work for the Government, and there is no claim for damages, liquidated, or unliquidated, not sounding in tort. When boiled down and freed from excessive verbiage the cause of action attempted to be set out against the defendant comes to the mere assertion that plaintiff has voluntarily furnished some *information* to the Navy Department in explanation of some vague, undefined "devices", not owned by the plaintiff, which he claims has proved of value. There is no allegation that the plaintiff was solicited for this information, or employed to make any study on behalf of the defendant on these devices but merely the contentious assertion that the plaintiff has explained the devices to the Navy in such a controversial way that the Department has been convinced against its will that these devices may be used in the manner and way that plaintiff contends. There is nothing to show that the "devices" are not the property of the Navy. Certainly no legal action is alleged and a petition for equitable relief must be reasonably definite and certain in its statement of a cause of action. *Schierling* v. *United States*, 23 C. Cls. 361.

The allegations of the petition are too vague and indefinite to permit a comprehensive knowledge of what the suit is for,

if not for compensation for general information furnished on certain devices, and we know of no law or regulation which permits recovery in such a case unless there has been a contract, express or implied. None is alleged.

The petition plainly shows no promise of payment for the alleged information. If the plaintiff has furnished something of value to the Navy, his redress is with the Congress.

Defendant's motion to dismiss is granted and the petition is dismissed. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

BOLIVAR COTTON OIL COMPANY v. THE UNITED STATES

[Congressional No. 17464. Decided December 1, 1941]

On the Proofs

Contract for cotton linters; claim voluntarily transferred.—The instant case, referred to the Court of Claims by Senate Resolution, under which a number of cases, representing claims arising out of contracts made with cotton seed oil mills at the time of the World War, were so referred, presents facts similar to the facts in a number of such cases in which judgment has been rendered in favor of plaintiffs (See *Hazelhurst Oil Mill & Fertilizer Co.* v. *United States*, Congressional No. 17453, 70 C. Cls. 334; *Farmers & Ginners Oil Co.* v. *United States*, Congressional No. 17357, 76 C. Cls. 294) except that in the instant case plaintiff is not the original party with whom the United States made the contract upon which liability, if any, arises; and it is accordingly *held* that the voluntary transfer to plaintiff of the claim in question, growing out of the cancellation of said contract by defendant, comes within the provisions of Section 3477, Revised Statutes, and plaintiff is therefore not entitled to recover.

Same.—Where the contract was made with another corporation, all of the property of which was sold to the plaintiff; and whereupon such sale the plaintiff rests its title and right to the claim in suit; it is *held* that the plaintiff by such sale acquired no interest in the claim upon which plaintiff is entitled to bring suit against the United States.

The Reporter's statement of the case:

Benet, Shand & McGowan for the plaintiff. *Mr. George R. Shields* was on the brief.

Mr. Assistant Attorney General Francis M. Shea for the defendant. *Messrs. W. W. Scott* and *F. J. Keating* were on the brief.

The court made special findings of fact as follows, upon the stipulation of the parties and the evidence adduced:

1. Senate Resolution 448 of March 3, 1923, referred to this court 285 claims which originated out of contracts made with the cottonseed-oil mills by the United States at the time of the World War. The contracts were terminated by the Government when the war ended but not in accordance with the terms thereof nor was any settlement ever offered to the mills under their provisions.

The plaintiff is one of the claimants named in the Senate resolution but is not the party with which the United States made the contract, upon which liability, if any, arises. This contract was made with the Shelby Oil Company and plaintiff claims to be entitled to bring this suit by reason of the facts set forth in the following findings which are made pursuant to the stipulation of the parties.

2. Shelby Oil Company, a corporation organized under the laws of the State of Mississippi, was engaged in the manufacture of products derivative from cottonseed during the years 1918 and 1919.

On May 26, 1920, Shelby Oil Company executed and delivered to Thomas G. Jordon, Trustee, a deed of trust for the use and benefit of Shelby Citizens Bank & Trust Company, wherein Shelby Oil Company conveyed its real estate, buildings, machinery, and plant to the trustee to secure the payment of an indebtedness of $30,000.00 owing to Shelby Citizens Bank & Trust Company. The deed provided that in the case of default in the payment of the indebtedness, then the trustee, at the request of Shelby Citizens Bank & Trust Company, should sell the property at public auction.

On July 18, 1921, default in the payment of the indebtedness by Shelby Oil Company having occurred, the trustee, Thomas G. Jordon, at the request of Shelby Citizens Bank & Trust Company, sold the real estate, buildings, machinery, and plant of Shelby Oil Company at public auction to the highest bidder, Shelby Citizens Bank & Trust Company, for $30,000.00.

On September 13, 1921, Shelby Citizens Bank & Trust Company, for the consideration of $30,010.00, sold the real estate, including the buildings, machinery, and plant, formerly the property of Shelby Oil Company, to one H. L. Wilkinson.

On November 10, 1921, H. L. Wilkinson sold the above-mentioned property to Bolivar Cotton Oil Company for the consideration of $45,000.00 and the assumption by the latter of an indebtedness of $30,000.00 due Shelby Citizens Bank & Trust Company by H. L. Wilkinson. Bolivar Cotton Oil Company was organized in November 1921 as a corporation under the laws of the State of Tennessee. It was formed for the purpose of taking over and operating the real estate, buildings, machinery, and plant which formerly belonged to Shelby Oil Company.

On November 8, 1921, Shelby Oil Company, acting under the authority of a resolution passed by its board of directors, sold all its personal property to Bolivar Cotton Oil Company for the consideration of the latter assuming an indebtedness of $20,000.00 owing by Shelby Oil Company to the Shelby Citizens Bank & Trust Company and an indebtedness of $797.64 owing by Shelby Oil Company to divers persons, firms, and corporations.

During the period August 1, 1918, to and including November 8, 1921, the stockholders of Shelby Oil Company were:

T. J. Poitevent
Mrs. T. J. Poitevent
Fred P. Shelby
George B. Shelby
Frank B. Hayne

The stockholders of the Bolivar Cotton Oil Company were:

H. L. Wilkinson
L. B. Wilkinson
J. W. Wilkinson
E. T. Lindsey
W. C. Manley
W. W. Denton
C. T. Jacobs

Except as stated herein, neither the claim in suit, nor any interest therein, has ever been transferred or assigned.

3. On or about September 5, 1918, effective, however, as of August 1, 1918, Shelby Oil Company entered into a contract with the DuPont American Industries, Inc., authorized and exclusive contracting agent for the United States for the sale of munition linters, known as "Seller's Contract of Sale No. 3184," by the terms of which it agreed to sell to the United States 1,600 bales (approximately 800,000 pounds) of linters, all as provided by said contract, a copy of which is attached to the petition herein as Exhibit #7 and made a part hereof by reference.

4. During the period January 1 to July 31, 1919, Shelby Oil Company crushed a total of 1,058 tons of seed, which at $6.77 per ton of seed crushed would amount to $7,162.66.

5. Shelby Oil Company received on account of the linters produced from such seed the following amounts:

For linters sold to the United States	$5, 537. 19
Total receipts	$5, 537. 19

By reducing its cut of linters after January 1, 1919, Shelby Oil Company realized an additional hull production to the extent of 37.03 tons, which at $13.50 per ton amounts to $499.91.

For the convenience of the Court, the parties hereby join in the following as a correct statement of the account between *Shelby Oil* Company and the United States upon the basis of the foregoing facts and the application of the stipulation filed in Congressional No. *17341:*

Debit Items Against Defendant

1,058 tons of seed at $6.77 per ton		$7,162.66
Total debits		$7,162.66

Credit Items Allowable to Defendant

Linters sold to United States	$5,537.19	
Additional hull credit	499.91	
Total credits		$6,037.10
Balance		$1,125.56

The court decided that the plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the Court:

This case presents to the Court an action which is based on a claim which is one of a number of similar claims referred to this court by Senate Resolution 448. The facts in the case are similar to those in a number of such cases in which judgment has been rendered in favor of plaintiff except that the plaintiff is not the original party with whom the United States made the contract upon which liability, if any, arises. This contract was made with the Shelby Oil Company, all of the property of which was sold to the plaintiff, and upon this sale it rests its title and right to the claim in suit.

It appears from the agreed statement of facts that in 1921 the Shelby Oil Company sold all of its personal property to the Bolivar Cotton Oil Company, plaintiff herein, for the consideration of that company assuming certain indebtedness of Shelby Oil Company amounting to $20,797.64. The record does not show that the sale specifically included choses in action or claims in suit but if the plaintiff did not acquire title by virtue of this sale then there is nothing to show that it has any right whatever to the claim. The transfer was a voluntary one and as such is within the provisions of Section 3477 Revised Statutes, 31 USCA 203, which provides:

Syllabus

> All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, * * * shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. * * *

It has been held that this provision does not apply to cases where the transfer was made by operation of law through will, bankruptcy or insolvency, or otherwise but the transfer here made was purely voluntary and therefore absolutely null and void under the statute. See *United States* v. *Gillis*, 95 U. S. 407; *Spofford* v. *Kirk*, 97 U. S. 484; *National Bank of Commerce* v. *Downie*, 218 U. S. 345.

We are constrained to hold that the plaintiff acquired no interest in the claim upon which it can bring suit against the United States.

Plaintiff's petition is therefore dismissed and it is ordered that the findings in the case be certified to Congress.

MADDEN, *Judge;* JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

SAM M. BRABSON v. THE UNITED STATES

[Departmental No. 175. Decided December 1, 1941]

On the Proofs

Property of Army officer damaged during shipment from post to home under order of retirement; "in the military service."—Where a commissioned officer in the Regular Army of the United States was retired for disability incident to the service; and where under proper orders he was relieved from assignment and duty at his then post and directed to proceed to his home; and where in the shipment of his household goods and other personal property from said post to his home said household goods and property were damaged; *it is held that plaintiff is entitled to recover* under the provisions of section one of the Act of March 4, 1921 (41 Stat. 1436; U. S. Code, Title 31, Section 218).

Same.—An officer acting under military orders is "in the military service" within the provisions of the Act of March 4, 1921.

Same.—In the instant case the plaintiff was traveling "under orders" and his property was being "transported by the proper agent or agency of the United States Government." See *Reginier* v. *The United States*, 92 C. Cls. 437.

The facts sufficiently appear from the opinion of the court.

GREEN, *Judge*, delivered the opinion of the court:

Pursuant to section 148 of the Judicial Code, the Secretary of War transmitted to this court the claim of Major Sam M. Brabson for loss of private property, accompanied by photostats of vouchers, papers, documents, and proof pertaining thereto, duly certified by the Judge Advocate General.

From these it appears that the claimant during the period in question had been since September 5, 1920, a commissioned officer in the Regular Army of the United States. On October 4, 1938, his retirement from active service for disability incident thereto was announced and he was relieved from assignment and duty at Fort Lewis, Washington, as of October 31, 1938, and directed to proceed to his home. The travel directed was declared necessary in the public service. He was entitled within one year from the date of his retirement to mileage and to the shipment at Government expense of 9,500 pounds of baggage (household goods and other personal property) to such a place as he might select as his home.

About October 24, 1938, Major Brabson's goods were delivered to the Quartermaster at Fort Lewis, Washington, for packing, crating, and shipping. After being packed and crated, on June 2, 1939, they were shipped by the Quartermaster at Fort Lewis to him at Orlando, Florida, in compliance with his request.

About August 30, 1939, the goods were received by Major Brabson at Orlando, Florida, in a damaged condition. An itemized statement of the damages and the estimated cost of repairs is shown in the report of the War Department submitted to this court. The estimated cost of repairs was $127.50. The shipment was not insured by Major Brabson. He submitted the claim to the Atlantic Coast Line Railroad

and received $34.97 in settlement thereof. On December 10, 1939, he submitted the instant claim in the amount of $92.53 ($127.50 less $34.97) to the War Department, and pursuant to the army regulations the claim was referred to a Board of Officers which found, among other things, that the damage was due to fault or negligence of the officers or employees of the Government; that the estimate of the cost to repair the damage ($127.50) appeared to be just and reasonable; that the claim came within the provisions of the Act of March 4, 1921, and recommended that it be approved in the amount of $92.53, being the amount claimed, less amount received from terminal carrier.

The claim and accompanying papers were then transmitted to the Chief of Finance who referred them to a board of officers for consideration who found, among other things:

> * * * that the packing and crating were performed under proper authority; that the damage occurred incident to claimant's travel under competent change of station orders; * * *

Taking into consideration that the weight of the shipment was in excess of the authorized allowance and prorating the damage less the amount received from the railroad company, it found that the claim was one probable for payment under Act of March 4, 1921, and recommended that it be paid in the amount of the Government's pro rata share, i. e., $47.24, which sum Major Brabson has agreed to accept in full settlement, release, and discharge of the claim.

The Chief of Finance transmitted the claim to the Assistant Secretary of War recommending that it be approved for payment in the amount of $47.24 but invited attention to opinions of the Comptroller General to the effect that, although regulations permitted the transportation of such property at public expense, there was no authority under the act of March 4, 1921, for reimbursement for loss, damage, or destruction thereof while being so transported; and to an opinion of the Judge Advocate General to the contrary. The Chief of Finance recommended further that the claim be referred to The Judge Advocate General for consideration and opinion with a view to transmitting it to the Court of Claims as a departmental reference. The Judge Advocate

General expressed the opinion that the claim came within the provisions of the act of March 4, 1921, and, after pointing out that claims of this nature are recurrent and the benefits of that act were being denied certain military personnel evidently entitled thereto, recommended that the claim be made the subject of a departmental reference to the Court of Claims.

Acting for the Secretary of War, and pursuant to the duty of supervising and acting upon claims by or against the War Department assigned him by the Secretary of War, the Assistant Secretary of War considered this claim and placed the following indorsement thereon:

> It is hereby certified that the articles of property, in the items and values as found by the Board were reasonable, useful, necessary, and proper for the claimant to have in his possession in the public service in the line of duty, while in quarters, or in the field, that the loss occurred under the circumstances ascertained and determined by the Board and without fault or negligence on the part of the claimant and that none of the items can be replaced in kind from Government property on hand. The value is hereby, under the provisions of the Act of Congress of March 4, 1921, (41 Stat. 1436) ascertained and determined in the amount recommended by the Chief of Finance.

Further, in view of the conflicting opinions mentioned in paragraph 10, above, the Assistant Secretary of War, acting upon the recommendation of the Judge Advocate General and for the reasons given by that officer, decided to make the claim the subject of a departmental reference to the Court of Claims before taking final action thereon.

At the time of this reference the claim had neither been paid nor disallowed and was pending within the jurisdiction of the Secretary of War.

Major Brabson has consented to this reference.

The claim of plaintiff is made under the Act of March 4, 1921 (41 Stat. 1436), of which the pertinent parts are as follows:

> SECTION 1. That private property belonging to officers * * * of the Army, * * * which * * * shall hereafter be lost, damaged, or destroyed in the mil-

> itary service, shall be replaced, or the damage thereto, or its value recouped to the owner as hereinafter provided, when such loss, damage, or destruction has occurred or shall hereafter occur without fault or negligence on the part of the owner in any of the following circumstances:
>
> THIRD. When during travel under orders such private property, including the regulating [regulation] allowance of baggage, transferred by a common carrier, or otherwise transported by the proper agent or agency of the United States Government, is lost, damaged, or destroyed; but replacement, recoupment, or commutation in these circumstances, where the property was or shall be transported by a common carrier, shall be limited to the extent of such loss, damage, or destruction over and above the amount recoverable from said carrier.

The Comptroller General as shown above in considering former cases disclosing facts of the same nature where "the property was damaged while being transported to the officer's home selected by him after he had been relieved of all military duties" held that as the officer's home was not stationed where military duty was performed, and as he had been relieved from all active duty when the transportation of his effects commenced his property was not damaged in the military service. By reason of this ruling, the case is now transmitted to this court for determination.

We think the ruling was erroneous and agree with the report of the Secretary of War who in discussing the facts of the case says: "The act appears clear and unambiguous and, except for a seemingly unwarranted restriction read into it by the Comptroller General, obviously embraces Major Brabson's claim". The words "in the military service" used in section 1 may be somewhat ambiguous but we think that an officer acting under military orders is "in the military service". If there be any doubt about this interpretation, we think it is removed by the further statement in section 1 that the value of the property lost shall be recouped "in any of the following circumstances" which includes the definition in paragraph 3 as follows:

> Third. When during travel under orders such private property, including the regulation allowance of baggage, transferred by a common carrier, or otherwise trans-

ported by the proper agent or agency of the United States Government, is lost, damaged, or destroyed, * * * U. S. Code, Title 31, Sec. 218.

The plaintiff was travelling "under orders" and the property was being "transported by the proper agent or agency of the United States Government". See *Regnier* v. *The United States*, 92 C. Cls. 437.

The case being one where the law authorizes us to render judgment, the claimant having consented to this reference, judgment accordingly will be entered against the defendant for $47.24. The Department will be so advised.

JONES, *Judge;* WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

LITTLETON, *Judge*, took no part in the decision of this case.

THE CHICKASAW NATION v. THE UNITED STATES AND THE CHOCTAW NATION

[No. K–336. Decided December 1, 1941. Motion of defendant, Choctaw Nation, for new trial overruled February 2, 1942]

On the Proofs

Indian claims; allotments to freedmen of the Choctaw Nation from tribal lands held in common by the Choctaw Nation and the Chickasaw Nation.—In the instant suit, authorized by the enabling act of June 7, 1924, as amended, the Chickasaw Nation, plaintiff, claims compensation for its one-fourth interest in the lands allotted to the freedmen of the Choctaw Nation from the tribal lands held in common by the Chickasaw Nation and the Choctaw Nation; and it is *held* by the court that the arrangement of the "Atoka agreement," whereby the Choctaw freedmen were to be furnished their allotments at the expense of the Choctaw Nation, and not of the plaintiff, was incorporated into the "supplemental agreement" of 1902 as an obligation of the Choctaw Nation; and accordingly the plaintiff is entitled to recover from the Choctaw Nation, defendant.

Same; allotments to Chickasaw freedmen.—It is shown by the evidence adduced that the Chickasaws never adopted their freedmen, as provided under the treaty of 1866 and subsequent acts of Congress, and no allotments were made to said Chickasaw freedmen from tribal lands as therein provided; that said Chickasaw freedmen did, however, receive allotments under

the "supplemental agreement" of 1902, which allotments were paid for by the United States and hence cost neither the Chickasaws nor the Choctaws anything; that the allotments to the Choctaw freedmen were made from the tribal lands owned in common by the two nations, and hence the Chickasaws contributed to said allotments their proportion, which was one-fourth, as recognized by treaties, statutes and practice; that the Chickasaws have consistently claimed that neither set of freedmen should be provided with land at the expense of the Chickasaws, which claim was assented to by the Choctaws in the "Atoka agreement," first, and again in the application to the Court of Claims in 1909 for a modification of the decree in the *Chickasaw Freedmen case* (38 C. Cls. 558; 193 U. S. 115).

Same; treaty of 1866.—The rights of the freedmen of the two nations were not regarded as settled, and were not settled, by the treaty of 1866.

Same; "supplemental agreement" of 1902.—The "supplemental agreement" of 1902, which is the determining document, provided for permanent and unqualified allotments to both Choctaw and Chickasaw freedmen, but omitted the provision of the "Atoka agreement" for deduction of said allotments from allotments to members of the respective nations; and as to the Chickasaw freedmen said "supplemental agreement" provided for determination in the Court of Claims as to whether said Chickasaw freedmen were entitled to allotments from tribal lands or whether the United States should supply at its expense said allotments to said Chickasaw freedmen.

The Reporter's statement of the case:

Mr. Melven Cornish for plaintiff.

Mr. Charles H. Small, with whom was *Mr. Assistant Attorney General Norman M. Littell*, for the United States. *Mr. Raymond T. Nagle* was on the brief.

Mr. William G. Stigler for the Choctaw Nation.

The decision in this case was filed December 1, 1941, holding that the plaintiff was entitled to recover from the defendant, the Choctaw Nation, and reserving the determination of the amount of recovery for further proceedings pursuant to Rule 39a. The court did not consider what was the liability, if any, of the defendant, the United States.

The defendant, the Choctaw Nation, filed a motion for new trial, on the grounds, among others, that the court was in error in concluding that the plaintiff was not entitled to

recover against the defendant, the United States, but against the defendant, the Choctaw Nation. On February 2, 1942, said motion for new trial was overruled.

The court made special findings of fact as follows:

1. This suit was filed pursuant to an act of Congress of June 7, 1934 (48 Stat. 537), which so far as here material, provided as follows:

> That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or the statutes of limitation, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Choctaw and Chickasaw Indian Nations or Tribes, or either of them, or arising under or growing out of any Act of Congress in relation to Indian affairs which said Choctaw and Chickasaw Nations or Tribes may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States.

The time for filing such suits was extended to June 30, 1930, by a Joint Resolution of February 19, 1929 (45 Stat. 1229, 1230).

2. The treaty of April 28, 1866 (14 Stat. 769), between the United States and the Choctaw and Chickasaw Nations, provided, *inter alia*, as follows:

* * * * *

> ARTICLE II. The Choctaws and Chickasaws hereby covenant and agree that henceforth neither slavery nor involuntary servitude, otherwise than in punishment of crime whereof the parties shall have been duly convicted, in accordance with laws applicable to all members of the particular nation, shall ever exist in said nations.
>
> ARTICLE III. The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the 98° west longitude, known as the leased district, provided that the said sum shall be invested and held by the United States, at an interest not less than five percent, in trust for the said nations, until the legislatures of the Choctaw and Chickasaw Nations, respec-

tively, shall have made such laws, rules, and regulations as may be necessary to give all persons of African descent, resident in the said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations, except in the annuities, moneys, and public domain claimed by, or belonging to, said nations respectively; and also to give to such persons who were residents as aforesaid, and their descendants, forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land, after the Choctaws and Chickasaws and Kansas Indians have made their selections as herein provided; and immediately on the enactment of such laws, rules, and regulations, the said sum of three hundred thousand dollars shall be paid to the said Choctaw and Chickasaw nations in the proportion of three-fourths to the former and one-fourth to the latter—less such sum, at the rate of one hundred dollars per capita, as shall be sufficient to pay such persons of African descent before referred to as within ninety days after the passage of such laws, rules, and regulations shall elect to remove and actually remove from the said nations, respectively. And should the said laws, rules, and regulations not be made by the legislatures of the said nations, respectively, within two years from the ratification of this treaty, then the said sum of three hundred thousand dollars shall cease to be held in trust for the said Choctaw and Chickasaw Nations, and be held for the use and benefit of such of said persons of African descent as the United States shall remove from the said territory in such manner as the United States shall deem proper—the United States agreeing, within ninety days from the expiration of the said two years, to remove from said nations all such persons of African descent as may be willing to remove; those remaining or returning after having been removed from said nations to have no benefit of said sum of three hundred thousand dollars, or any part thereof, but shall be upon the same footing as other citizens of the United States in the said nations.

Article III was not complied with within the two year period by either the Choctaws or the Chickasaws. The United States did not remove any freedmen pursuant to the treaty.

3. By an act of Congress approved May 17, 1882 (22 Stat. 68, 73), the sum of $10,000 was appropriated out of the $300,000 reserved by article III of the treaty of 1866 for the education of the freedmen of the Choctaw and Chickasaw Nations. It was provided that either tribe might, before the expenditure was made, adopt its freedmen in accordance with article III of the treaty of 1866 and in such case the money provided for education would be paid over to the tribe, in its proper share.

By a measure of the general council of the Choctaw Nation approved May 21, 1883, entitled "*An Act to adopt the freedmen of the Choctaw Nation*," enacted in conformity with the act of Congress approved May 17, 1882 (supra), the Choctaw Nation adopted its freedmen. Sections 1 and 3 provided:

> SEC. 1. Be it enacted by the General Council of the Choctaw Nation assembled, that all persons of African descent resident in the Choctaw Nation at the date of the treaty of Fort Smith, Sept. 13, 1865, and their descendants formerly held in slavery by the Choctaws or Chickasaws, are hereby declared to be entitled to and invested with all the rights, privileges, and immunities, including the right of suffrage of citizens of the Choctaw Nation, except in the annuities moneys and the public domain of the nation.
>
> SEC. 3. Be it further enacted, that all said persons are hereby declared to be entitled to forty acres each of the lands of the nation, to be selected and held by them under the same title and upon the same terms as the Choctaws.

No permanent allotments were ever made under this legislation.

The Chickasaws did not adopt their freedmen and objected to allotments to the Choctaw freedmen out of the commonly owned lands.

4. The Chickasaw Nation, the Choctaw Nation, and the members of the Dawes Commission to the Five Civilized Tribes, on behalf of the United States, entered into an agreement on April 23, 1897, known as the "Atoka" agreement, providing for allotments in severalty of their common lands and the sale or disposition of other common properties of the tribes. This agreement, as amended, was

ratified and confirmed by the Curtis act (30 Stat. 495, 503), and made a part thereof, and was subsequently approved by a majority vote of the members of each of the tribes.

5. The original Atoka Agreement, between the Commissioners for the United States and the Choctaw and Chickasaws Nations was negotiated at Atoka, in the Indian Territory and signed on April 23, 1897. Chairman Dawes of the Commission was not present.

The agreement provided for forty-acre allotments to the Choctaw freedmen and contained a provision for the reduction of the allotments of Choctaw Indian citizens on account of the allotments to Choctaw freedmen, as follows:

> Provided that the lands allotted to the Choctaw freedmen, are to be deducted from the portion to be allotted under this agreement to the members of the Choctaw tribe, so as to reduce the allotments to the Choctaws by the value of the same and not affect the value of the allotments to the Chickasaws.

The Agreement contained no provision relating to allotments to the Chickasaw freedmen.

6. The agreement as ratified by the Act of Congress of June 28, 1898 (30 Stat. 495), was amended by providing for the 40-acre allotments to the Chickasaw Freedmen, but with the condition that such allotments were,

> * * * to be selected, held and used by them until their *rights* under said treaty [the Treaty of 1866], shall be determined, in such manner as shall hereafter be provided by Act of Congress;

and the provision (set out in the preceding paragraph), for the reduction of the allotments of Choctaw Indian citizens on account of allotments of the Choctaw Freedmen, was amended by providing that the allotments of Chickasaw Indian citizens be also reduced on account of allotments to the Chickasaw Freedmen, as follows:

> That the lands allotted to the Choctaw and Chickasaw freedmen are to be deducted from the portion to be allotted under this agreement to the members of the Choctaw and Chickasaw tribe so as to reduce the allotment to the Choctaws and Chickasaws by the value of the same.

7. The Chickasaw Nation, the Choctaw Nation, and the United States, entered into a further agreement on March 21, 1902 (32 Stat. 641). This agreement, known as the "Supplemental" agreement, contained detailed provisions for the enrollment of the members and freedmen of the Choctaw and Chickasaw Nations, the appraisement and allotment of the common lands in severalty to the members and freedmen of the two tribes, the sale of the residue of such lands after allotments had been made and equalized, and the reservation and sale or disposition otherwise of the common properties of the two tribes, and the distribution of all moneys arising therefrom.

8. The Supplemental Agreement provided in sections 36 to 40, inclusive, for a suit in the United States Court of Claims, with right of appeal to the Supreme Court, to test the rights of the Chickasaw freedmen to the commonly owned lands alloted to them under the Atoka Agreement. These sections appeared under the heading "Chickasaw Freedmen."

Sections 36, 37, and 40 provided:

> 36. Authority is hereby conferred upon the Court of Claims to determine the existing controversy respecting the relations of the Chickasaw freedmen to the Chickasaw Nation and the rights of such freedmen in the lands of the Choctaw and Chickasaw nations under the third article of the treaty of eighteen hundred and sixty-six, between the United States and the Choctaw and Chickasaw nations, and under any and all laws subsequently enacted by the Chickasaw legislature or by Congress.
>
> 37. To that end the Attorney General of the United States is hereby directed, on behalf of the United States, to file in said Court of Claims, within sixty days after this agreement becomes effective, a bill of interpleader against the Choctaw and Chickasaw nations and the Chickasaw freedmen, setting forth the existing controversy between the Chickasaw Nation and the Chickasaw freedmen and praying that the defendants thereto be required to interplead and settle their respective rights in such suit.
>
> * * * * *
>
> 40. In the meantime the Commission to the Five Civilized Tribes shall make a roll of the Chickasaw

> freedmen and their descendants, as provided in the Atoka agreement, and shall make allotments to them as provided in this agreement, which said allotments shall be held by the said Chickasaw freedmen, not as temporary allotments, but as final allotments, and in the event that it shall be finally determined in said suit that the Chickasaw freedmen are not, independently of this agreement, entitled to allotments in the Choctaw and Chickasaw lands, the Court of Claims shall render a decree in favor of the Choctaw and Chickasaw nations according to their respective interests, and against the United States, for the value of the lands so allotted to the Chickasaw freedmen as ascertained by the appraisal thereof made by the Commission to the Five Civilized Tribes for the purpose of allotment, which decree shall take the place of the said lands and shall be in full satisfaction of all claims by the Choctaw and Chickasaw nations against the United States or the said freedmen on account of the taking of the said lands for allotment to said freedmen: *Provided*, That nothing contained in this paragraph shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid.

It was provided in section 68 that:

> No act of Congress or treaty provision, nor any provision of the Atoka agreement, inconsistent with this agreement, shall be in force in said Choctaw and Chickasaw nations.

9. At the time of the negotiations for the Supplemental Agreement in Washington, D. C., in February and March 1902, the Chickasaws insisted that the agreement contain some provision saving their rights not to have allotments to Choctaw freedmen made at the expense of the Chickasaws' interest in the commonly owned lands. After conference with the assistant attorney general, who was legal adviser to the Department of the Interior, it was agreed that the proviso to section 40 set out in finding 8 be included to protect their interests.

10. Suit was brought as provided in sections 36–40 of the Supplemental Agreement. Judgment for $606,936.08 was rendered against the United States and paid to the two

nations, in the proportion of one-fourth to the Chickasaws and three-fourths to the Choctaws (38 C. Cls. 558, 193 U. S. 115).

11. In that suit, prior to the entry of final judgment on January 24, 1910, the Choctaws filed an "Application for Additional Decree" in which they set out that the Chickasaws were entitled to pay for their proportionate interest in the commonly owned lands allotted to the Choctaw freedmen and requested the court to enter a supplemental decree deducting from their proportionate share of the judgment one-fourth of the value of the jointly held lands alloted to the Choctaw freedmen and add that amount to the amount to be apportioned to the Chickasaw nation under the judgment.

No action was ever taken by the Court on this request.

12. On March 11, 1910, the Governor of the Chickasaw Nation wrote to the Commissioner of Indian Affairs requesting permission to employ separate counsel for the Chickasaw Nation and setting out in support of his request the Chickasaws' claim for compensation for lands allotted to the Choctaw freedmen out of the common domain of the two nations without the consent of the Chickasaws and pointed out that the Chickasaws had had no attorney to represent them at the time that judgment was entered in the suit brought pursuant to the Supplemental Agreement.

March 16, 1910, denial of the request was recommended by the Commissioner of Indian Affairs on the ground that in view of the admission of the Choctaws in their request for an additional decree, judicial action did not seem to be necessary to settle the controversy. A final determination was promised within ten days. No such determination seems ever to have been made.

13. The Chickasaw Nation has never received any compensation for its common interest in the lands allotted to the Choctaw Freedmen, by the reduction of the allotments of Choctaw Indian citizens, or by an adjustment or settlement otherwise.

14. The Superintendent for the Five Civilized Tribes reported on July 26, 1939, that allotments had been made

to 5,973 Choctaw freedmen of 266,435.13 acres of land, the appraised value of which for allotment purposes was $763,739.12.

The court decided that the plaintiff was entitled to recover against the defendant, the Choctaw Nation, but the determination of the amount of recovery was reserved for further proceedings. (See Rule 39a.)

MADDEN, *Judge*, delivered the opinion of the court:

By a treaty between the United States and the tribes, the Chickasaw and Choctaw tribes of Indians held lands in what is now Oklahoma "in common; so that each and every member of either tribe shall have an equal undivided interest in the whole." The tribes took part in the Civil War on the side of the Confederacy. In 1865, by treaty, the tribes renewed their allegiance to the United States and acknowledged themselves to be under its protection.[1]

In 1866 in a treaty between the United States and the tribes, the tribes agreed to abolish slavery. In Article III of the treaty, the tribes ceded to the United States a part of their territory, in consideration of the sum of $300,000 to be held in trust by the United States, until the legislatures of the tribes should within two years confer upon their former slaves, or freedmen the privileges of citizens, excepting rights in the "annuities, moneys, and public domain of the tribes," and also should give each freedman forty acres of land. It provided that if these benefits were not conferred upon the freedmen, the United States would remove the freedmen from among the Indians, and hold the money in trust for the freedmen.

The tribes did not adopt the specified legislation within the two-year period and the United States did not thereafter remove the freedmen. Hence they remained with the Indians without defined political status or property rights. In 1882 Congress again offered a financial inducement to either tribe which would adopt its freedmen in accordance

[1] See *The Chickasaw Freedmen*, 193 U. S. 115, affirming 38 C. Cls. 558, for a fuller recital of pertinent early history. For other phases of the present controversy, see *The Choctaw and Chickasaw Nations* v. *The United States*, 81 C. Cls. 63.

with the terms of Article III of the treaty of 1866 (22 Stat. 68, 72). The Choctaws adopted legislation to this end in 1883, but attached qualifications which may have prevented it from complying with the treaty of 1866. This legislation probably conferred political rights upon the Choctaw freedmen, but there is no showing that any land was permanently allotted to them. Between this time and 1897 the Choctaws desired to give their freedmen allotments, and the Chickasaws were unwilling to adopt theirs, or to permit the Choctaws to give lands to the Choctaw freedmen out of the common tribal lands. In 1897 the United States Commission to the Five Civilized Tribes (the Dawes Commission) negotiated at Atoka, in the Indian Territory, a proposed agreement with the Choctaws and Chickasaws which provided that all tribal lands should be allotted to the Choctaws and Chickasaws, except that the Choctaw freedmen should each receive forty acres, and that the amounts of land so allotted to the Choctaw freedmen should be subtracted from the amounts which would otherwise have been allotted to the Choctaw Indians. By this arrangement the Choctaws would have been giving lands to their freedmen out of their own share, and the Chickasaws would have been making no contribution from their share of the lands. The Chickasaw freedmen were not mentioned in the proposed agreement, it apparently being understood that they had not been adopted and had no rights.

Chairman Dawes was not present at Atoka, and when the proposed agreement was sent to Washington, it was modified before being enacted by Congress in 1898 as a part of the Curtis Act (30 Stat. 495, 505), to give the Chickasaw freedmen as well as the Choctaw freedmen forty-acre allotments, the allotments to the freedmen of each tribe to be subtracted from the allotments to the Indians of that tribe. Each tribe was, therefore, to furnish the land for its own freedmen. As to the Chickasaw freedmen it provided that they should each be allotted forty acres "to be selected, held, and used by them until their rights under said treaty [the treaty of 1866] shall be determined in such manner as shall be hereafter provided by act of Congress." The Atoka

agreement as enacted by Congress was approved by a majority vote of the members of each of the tribes.

A "supplemental" agreement was made on March 21, 1902, between the United States and the two tribes, which was embodied on July 1 of that year in an act of Congress (32 Stat. 641) and ratified by the citizens of the two tribes. This agreement contained detailed provisions for the enrollment of the members and freedmen of the tribes, the allotment to each member of 320 acres instead of the allotment of all the land as in the Atoka agreement, the allotment to each Choctaw and Chickasaw freedman of 40 acres, the sale of the remaining unallotted land and the distribution of the proceeds.[2]

The supplemental agreement had no provision analagous to the provision of the Atoka agreement as negotiated at Atoka requiring the Choctaws to provide for their own freedmen by subtraction from their own allotment, nor to the provision of that agreement as enacted by Congress making the same requirement of both the Choctaws and Chickasaws. It did, however, in section 36 take notice of the Chickasaw claim that its freedmen had no rights, by conferring authority upon the Court of Claims to determine whether such freedmen had rights in the tribal lands under the treaty of 1866 and subsequent legislation. To that end it directed the Attorney General of the United States to file a bill of interpleader in the Court of Claims against the Choctaws and Chickasaws and the Chickasaw freedmen.

Sections 40 and 68 of the supplemental agreement, as enacted by Congress, were as follows:

> 40. In the meantime the Commission to the Five Civilized Tribes shall make a roll of the Chickasaw freedmen and their descendants, as provided in the Atoka agreement, and shall make allotments to them as provided in this agreement, which said allotments shall be held by the said Chickasaw freedmen, not as temporary allotments, but as final allotments, and in the event that it shall be finally determined in said suit that the Chickasaw freedmen are not, independently of this agreement, entitled to allotments in the Choctaw

[2] See *The Choctaw Nation v. The United States and The Chickasaw Nation*, 83 C. Cls. 140, 144.

and Chickasaw lands, the Court of Claims shall render a decree in favor of the Choctaw and Chickasaw nations according to their respective interests, and against the United States, for the value of the lands so allotted to the Chickasaw freedmen as ascertained by the appraisal thereof made by the Commission to the Five Civilized Tribes for the purpose of allotment, which decree shall take the place of the said lands and shall be in full satisfaction of all claims by the Choctaw and Chickasaw nations against the United States or the said freedmen on account of the taking of the said lands for allotment to said freedmen: Provided, That nothing contained in this paragraph shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid.

* * * * *

68. No act of Congress or treaty provision, nor any provision of the Atoka agreement, inconsistent with this agreement, shall be in force in said Choctaw and Chickasaw nations.

The suit in the Court of Claims was filed, and the court held [3] that the Chickasaw freedmen had no rights prior to the enactment of the supplemental agreement. It therefore rendered judgment against the United States in favor of the two tribes in the proportion of one-fourth to the Chickasaws and three-fourths to the Choctaws [4] for the value of the land allotted to the Chickasaw freedmen. The amount of the judgment was ultimately determined to be $606,936.08 which was paid to the tribes in the specified proportions. Prior to the entry of final judgment in that suit on January 24, 1910, the Choctaws filed an "Application for Additional Decree" stating that the Chickasaws were entitled to be paid for their proportionate one-fourth interest in the commonly owned lands allotted to the Choctaw freedmen and requesting the court to enter a supplemental decree deducting the amount to which the Chickasaws would be thus entitled from

[3] *United States* v. *The Choctaw Nation*, 38 C. Cls. 558, affirmed sub nom. *The Chickasaw Freedmen*, 193 U. S. 115.

[4] These are the proper proportions recognized by treaties, statutes, and practice of the shares of the two tribes in such distributions. See *The Choctaw Nation* v. *the United States and the Chickasaw Nation of Indians*, 83 C. Cls. 140.

the Choctaws' share of the instant judgment. This court did not act upon that request, apparently because it was beyond the scope of the enabling act under which the suit was brought.

On March 11, 1910, the Governor of the Chickasaw Nation wrote to the Commissioner of Indian Affairs requesting permission to employ counsel for the Chickasaw Nation and stating the Chickasaw claim which is the subject of this suit. This request was not acted upon, an interdepartmental recommendation saying that in view of the Choctaws' admission of liability in their request for an additional decree, litigation would not seem necessary to settle the controversy.

The enabling act of Congress authorizing this suit was passed on June 7, 1924 (43 Stat. 537). The Chickasaws claim compensation for their one-fourth interest in the common tribal lands allotted to the Choctaw freedmen under the supplemental agreement of 1902, with interest.

The foregoing recital shows that the Chickasaws never adopted their freedmen; that their freedmen did receive allotments under the agreement of 1902, but that these allotments were paid for by the United States, and hence cost neither the Chickasaws nor the Choctaws anything; that the allotments to the Choctaw freedmen were made from the commonly owned tribal lands, and hence the Chickasaws contributed one-fourth of those allotments; that the Chickasaws have consistently claimed that neither set of freedmen should be provided with land at the expense of the Chickasaws; that the Choctaws, in the agreement negotiated at Atoka in 1897 assented to this position by agreeing that the Choctaws should provide allotments for their freedmen by deductions from their own allotments and by omitting any provision at all for allotments to Chickasaw freedmen; that the Choctaws again, in their application to the Court of Claims in 1909 for a modification of the decree in the Chickasaw freedmen case, desired to compensate the Chickasaws for their contribution to the allotments of the Choctaw freedmen.

The defendants, the United States and the Choctaw Nation, assert that the Chickasaws assented, in the treaty of 1866, in the Atoka agreement as enacted by Congress in 1898, and in the supplemental agreement of 1902, to the adoption by the Choctaws of their freedmen and the allotment of land to them. Whatever may have been the power of the Choctaws, under the treaty standing alone, to make such a wholesale adoption,[5] and give such adopted persons a share in the Chickasaws' interest in the lands, the whole history of the controversy shows that none of the parties ever so interpreted the treaty. The subject of the rights of the freedmen in the lands was a constant subject of negotiation. It was not regarded as settled, and was not settled by the treaty of 1866.

As to the Chickasaws' consenting in the Atoka agreement and the agreement of 1902 to the Choctaws' adopting their freedmen and providing them with land, there was, of course, consent. But it was given on terms. In the Atoka agreement the terms were that the Choctaws were to provide the land for their own freedmen by subtraction from their own allotments. As that agreement was enacted by Congress, the same provision was made for the Chickasaws, but their freedmen's allotments were made temporary and subject to further determination as to their rights. So the consent there given was no consent to a provision for the Choctaw freedmen at the expense of the Chickasaws.

The supplemental agreement of 1902 is, therefore, the determining factor. That agreement, as we have said above, provided for permanent and unqualified allotments to both Choctaw and Chickasaw freedmen. It omitted the provision of the Atoka agreement for deduction from allotments to members. As to the Chickasaw freedmen, it provided for determination in the Court of Claims as to whether they were entitled to allotments from tribal lands, or whether the United States should supply those allotments at its

[5] The Superintendent for the Five Civilized Tribes reported on July 26, 1939, that allotments had been made to 5,973 Choctaw freedmen of 266,435.13 acres of land, the appraised value of which for allotment purposes was $763,739.12.

expense. In section 68 it repealed inconsistent provisions of the Atoka agreement.

Plaintiff claims, and we have found, that in the negotiation for the supplemental agreement of 1902, plaintiff asserted that it should not have to contribute to the allotments for Choctaw freedmen, and that the proviso inserted in section 40 was drawn, in part, for the purpose of protecting it from that burden. The language is as follows:

> *Provided*, That nothing contained in this paragraph shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid.

This language is not well chosen for the purpose for which plaintiff claims and we find it was inserted. It relates, on its face, only to the matters "contained in this paragraph," and the paragraph relates to allotments to the Chickasaw freedmen and the suit in the Court of Claims to determine the rights of those freedmen, and of the rights of the two tribes to compensation for those allotments. Yet the determination of the matters to which the paragraph directly relates might well have had effects upon the question at issue in this litigation. If this court had held in that litigation that the Chickasaw freedmen were entitled to allotments from the tribal lands, there would have been the question as to whether those allotments should be taken from the Chickasaw interest in the lands or from the interests of both tribes, and that would have raised a similar question as to the Choctaw freedmen's allotments.

If the proviso had related only to the allotments to Chickasaw freedmen, it would have been natural for the language not to speak generally of "allotments to freedmen" as it did, but to speak of "allotments to said (or such) freedmen" or "allotments to Chickasaw freedmen." Three times earlier in the same paragraph "Chickasaw freedmen" are mentioned, and twice just before the proviso "said freedmen" are referred to. The mention in the proviso, in the alternative,

of "the money, if any, recovered as aforesaid," does not, we think, make it certain that the proviso was speaking only of the Chickasaw freedmen's allotments. It no doubt included them, but we think it also included the Choctaw allotments.

It would have been strange for plaintiff to have, for no reason which has been suggested, yielded its position on the point of the Choctaw freedmen's allotments in 1902, after having maintained it consistently for so long. If it had so yielded in 1902, it is impossible that the Choctaws would have, in 1909, and before the litigation mentioned in the paragraph had been completed, sought to present to the Chickasaws a large sum of money in compensation for the claim, at a time when the Chickasaws were not even represented by an attorney. We have no doubt that the Choctaws understood the proviso as we have interpreted it.

We conclude, therefore, that the arrangement of the Atoka agreement whereby the Choctaw freedmen were to be furnished their allotments at the expense of the Choctaws and not of plaintiff was incorporated into the supplemental agreement of 1902, as an obligation of the Choctaw Nation. Since the Choctaw Nation is a party to this suit, having been made such pursuant to Section 6 of the Jurisdictional Act under which this suit is brought, we conclude that plaintiff is entitled to recover from the Choctaw Nation, but the determination of the amount of the recovery is reserved for further proceedings pursuant to Rule 39 (a).

The primary obligation being that of the defendant, the Choctaw Nation, and there being no claim that that defendant is unable to satisfy whatever judgment may be rendered, we do not consider nor decide what is the liability, if any, of the defendant, the United States.

It is so ordered.

JONES, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

TRIEST & EARLE, INC., A CORPORATION, v. THE UNITED STATES

[No. 43310. Decided December 1, 1941. Plaintiff's motion for new trial overruled February 2, 1942]

On the Proofs

Government contract; excess cost; additional work; liquidated damages for delay.—Under a contract entered into by the plaintiff to furnish all labor and material and perform all work required for the construction of a movable-span highway bridge over the branch channel of the Chesapeake & Delaware Canal at Delaware City, Delaware; it is *held* that the plaintiff is not entitled to recover for excess cost and damage alleged to have resulted from misrepresentations as to character of material to be encountered in the performance of the work called for by the contract nor for alleged extra work nor for liquidated damages alleged to have been erroneously withheld by the defendant for delay in completion of the work.

Same; failure to interpret properly data furnished.—Where it is shown by the evidence that the conditions encountered by the plaintiff in excavating for the east pier were not different from what might reasonably have been expected from an examination of the specifications and drawings; and where it is shown that the information recorded by the defendant and made available to bidders fairly represented the nature of the material to be excavated and the conditions to be encountered; it is *held* that the increased cost incurred by the plaintiff by reason of the difficulties encountered was due to plaintiff's failure to interpret properly the data furnished by the defendant and not from any misrepresentation by the defendant nor defendant's failure to furnish plaintiff with all the information had by defendant.

Same; extra pay for extra work.—Where in the construction of the west pier additional work was required by the contracting officer and plaintiff was granted extra time therefor and was paid the agreed compensation therefor; it is *held* that the proof does not sustain plaintiff's claim that plaintiff should have been paid more.

Same; liquidated damages.—It is shown by the evidence that the decision of the contracting officer holding plaintiff responsible for 80 days' delay was correct and liquidated damages were accordingly properly deducted therefor in accordance with the terms of the contract.

The Reporter's statement of the case:

Mr. Josephus C. Trimble for the plaintiff.

Mr. Robert E. Mitchell, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Mr. Charles H. McCarthy* was on the brief.

Plaintiff seeks to recover $19,126 made up of $15,126, excess cost and damage alleged to have resulted from misrepresentations as to character of material to be encountered in performance of the work called for by the contract and alleged extra work, and $4,000 alleged to have been erroneously withheld by the defendant as liquidated damages for delay in completion of the work under the contract.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. The plaintiff, a Pennsylvania corporation, entered into a contract with the defendant February 6, 1933, represented by Earl I. Brown, colonel, Corps of Engineers, District Engineer, War Department, as contracting officer, whereby plaintiff agreed to furnish all labor and materials and perform all work required for the construction of a movable-span highway bridge over the branch channel of the Chesapeake & Delaware Canal at Delaware City, Delaware, for the consideration of $69,789; additional concrete $10 a cubic yard; untreated wood piles 40 cents a linear foot; increase in length of creosoted wood piles 50 cents a linear foot in accordance with specifications, schedules, and drawings all made a part of the contract. The work was to be commenced within 30 calendar days after day of receipt of notice to proceed and be completed within 175 calendar days after date of such receipt.

The contract, with drawings and specifications, is in evidence and is made a part hereof by reference.

Notice to proceed was received by plaintiff March 8, 1933, thus fixing the ultimate date for completion August 30, 1933.

2. The plans and specifications for the bridge to be constructed were prepared by consulting engineers under the direction of the contracting officer. Two wash borings had been taken at the site in the spring of 1922 by the consulting

engineers for the Government, and were located Boring No. 1 alongside the west pier and Boring No. 2 about 30 feet from the east pier. A log was made of the borings and, with their location, shown on sheet No. 2 of the contract drawings. The log of Boring No. 1, so shown, is as follows:

Elevation	*Material*
+12 to −9	Coarse gray sand and some fine gravel. Easy going.
−9 to −13	Same. Easy driving and jetting.
−13 to −15	Coarse gravel. Some sandstone. Particles of mica.
−15 to −21	Sandstone with yellowish brown clay. Hard driving and jetting.
−21 to −27	Dark gray sandy clay. Fairly hard driving and jetting.
−27 to −30	Same with small pieces broken oyster shell. Hard driving and jetting.
−30 to −33	Very fine black sand. See sample No. 14. Easy driving and jetting.
−33 to −39	Fine gray sand and mica. Fairly easy driving and jetting.
−39 to −45	Hard tough bluish clay with occasional pieces of sandstone. See sample No. 15. Hard driving and jetting.
−45 to −51	Same clay. Hard driving and jetting.
−51 to −57	Same clay with small pieces of shell. Hard driving and jetting.
−57 to −63	Same clay. Hard driving and jetting.
Beyond	Same clay. Fairly hard driving and jetting.

The log of Boring No. 2, so shown, is as follows:

+7.5 to −10	Soft black mud and sand. Easy going.
−10 to −14	Soft black mud and sand with a little black clay. Easy going.
−14 to −20	Fine gravel and sand. Hard driving and jetting.
−20 to −26	Gravel and gray sandstone with a little dark gray clay. Hard driving and jetting.
−26 to −29	Dark gray sandy clay with pieces of sandstone and broken shell. Hard driving and jetting.
−29 to −32	Very fine black sand. Sample No. 14. Easy driving and jetting.
−32 to −36	Fine gray sand with some mica and fine gravel. Fairly hard driving and jetting.

Elevation	*Material*
—36 to —44	Hard tough bluish gray clay with a few pieces of sandstone. See sample No. 15. Hard driving.
—44 to —50	Hard tough gray clay with occasional pieces of sandstone. Fairly hard going.
—50 to —56	Same hard tough gray clay with same sandstone. Hard driving and jetting.
—56 to —62	Hard dark gray clay. Fairly hard driving and jetting.
Beyond	Hard dark gray clay mixed with a little mica and sandstone. Fairly hard driving and jetting.

The elevations refer to Delaware River datum.

The contract drawings, including sheet No. 2, had been furnished the plaintiff for use in bidding for the work, and were used by plaintiff in making up its bid.

3. In excavating for the piers plaintiff used the open cofferdam method, according to which steel sheet piling was driven around the location of the pier and excavation made from the area thus inclosed down toward the base of the piling, short thereof a sufficient distance to give the piling a good foothold. As the excavation progressed timber walers were placed against the side of the cofferdam to give the steel sheet piling support against pressure from the outside.

The excavation in the cofferdam for the east pier proceeded in a satisfactory manner until elevation of —13 was reached. At about that elevation a thin layer of hardpan was encountered, below which the material was found to be soft running sand. This sand was not stable enough to give sufficient support to the toe of the steel sheet piling, with the result that the sheet piling buckled in from the pressure of the outside, and the base of the cofferdam was deformed. The cofferdam had been designed so as to permit pouring of the concrete without the use of forms for the base.

This failure of the east cofferdam occurred about March 29, 1933. To remedy this situation the contracting officer required other steel sheet piling to be driven on the canal side of the sheet piling that had buckled and, with the additional excavation thus made possible, the contract area was attained and the contract depth of —17 reached.

The conditions encountered by plaintiff in excavating for the east pier were not different from what might reasonably have been expected from an examination of the contract, specifications, and drawings, including the log of borings as shown therein.

4. The contracting officer, after the foundation surface was thus exposed, caused borings to be made in the east cofferdam, as a result of which he concluded that foundation piles would have to be driven, and they were driven; for this work plaintiff has been duly compensated in money and extension of time.

5. As a result of its experience with the east cofferdam, plaintiff redesigned the cofferdam for the west pier using longer and stronger steel sheet piling and allowing a greater area for excavation instead of driving to the neat line as in the east cofferdam. No serious difficulty was encountered in the west cofferdam and the contracting officer, as in the case of the east cofferdam, concluded that the foundation should rest on piles, which were driven and plaintiff was given extra time and agreed compensation therefor.

6. November 22, 1933, by Change Order No. 3, the contracting officer ordered certain extra work to be done and for that work allowed plaintiff additional time of two days, thus extending the contract date for completion to September 1, 1933.

7. In March of 1934 the contracting officer made the following findings of fact, transmitting a copy to plaintiff:

Date of receipt by contractor of notice to proceed with work	March 8, 1933
Date fixed for commencement of work	April 7, 1933
Date fixed for completion of work	Sept. 1, 1933

(2 days allowed for completion of extra work covered by Change Order No. 3, dated November 22, 1933.)

I certify that the contract has been completed in accordance with the terms and conditions thereof, except as to the time limit fixed for completion, and that the work has been accepted by me for and on behalf of the United States.

I find that the work under the contract was delayed and prevented due to unforeseeable causes beyond the

control and without the fault or negligence on the part of the contractor, as follows:

	Days
On March 20, April 4 and 12, and May 8, 1933, unusually heavy rains prevented the contractor from performing any work, which delayed the completion of the work	3
From April 24 to May 19, 1933, both dates inclusive.—The work of constructing the east main pier of the bridge was delayed, to permit driving of sufficient bearing piles for the pier foundation, it having developed in the progress of the work that the bearing capacity of the soil was not sufficient to support the pier without piling. (See Par. 62 of specifications.) The work of procuring and driving 94 piles to an average penetration of 21 feet for the east pier delayed the completion of the work	25
On July 8, and from July 15 to August 7, 1933, both dates inclusive.—The work of constructing the west main pier of the bridge was delayed, to permit driving of sufficient bearing piles for the pier foundation, it having been ascertained on July 7, 1933, that the bearing capacity of the soil was insufficient to support the pier without piling. (See Par. 62 of Specifications.) The work of procuring and driving 97 piles to an average penetration of 26 feet for the west pier delayed the completion of the work	26
From July 12 to 14, 1933, both dates inclusive.—After the contractor had completed the work of driving 13 piles for the east approach span of the bridge, he was directed to make further efforts to secure greater penetration for the piles. While the desired penetration was not attained, the piles were accepted as having satisfactory bearing power. The extra time spent in driving the piling delayed the completion of the work	3
On August 21, 23, and 24, 1933.—A northeast storm of unusual severity during which the precipitation was 3.70 inches and the maximum wind velocity exceeded 50 miles per hour, prevented any work being done, which delayed the completion of the work	3
From November 14 to 17, 1933, both dates inclusive.—The contractor was delayed by unseasonably cold weather for periods totaling one day, while preparing forms for pouring concrete road slabs on the bridge. On account of cold weather, concrete could not be poured until November 18, 1933, which delayed the completion of the work	1
Total	61

Weather reports issued by the Forecaster at Philadelphia, Pa., for March 20, April 4 and 12, May 8, August 21, 23, and 24, November 14–17, 1933, inclusive, are attached hereto.

The highway bridge constructed at Delaware City, Del., is located approximately 50 miles below Philadelphia, Pa., and weather conditions in this vicinity, are in general, more severe than in the area of Philadelphia, Pa. The storm that commenced on August 21, 1933, was the most severe storm, especially along the Atlantic

Coast, that had been experienced in this section during the present century.

The contractor notified the District Engineer of the delays in the work, which delays were also known and on record at this office through reports submitted by U. S. Inspectors assigned to the supervision of the work.

On April 5, 1934, the sunken scow, for which $900 was withheld on Voucher No. 2561, for March, 1934, Philadelphia, Pa., accounts of Major MASON J. YOUNG, C. E., was removed and satisfactorily disposed of by the contractor without expense to the United States.

Plaintiff has received the contract price for the work that occasioned the delay of 26 and 25 days referred to in the contracting officer's findings.

For the time and labor spent in efforts to secure greater penetration of the 13 piles for the east approach span of the bridge, the contracting officer did not increase the contract price. Plaintiff drove the 13 piles down to a depth of less than 33 feet, when further penetration became difficult. The contracting officer investigated the situation and required plaintiff to continue driving. Plaintiff continued driving, but was unable to penetrate to 33 feet. The contracting officer accepted the penetration short of 33 feet and allowed plaintiff an extra 3 days for the continued driving. No written order was given or demanded. There is no proof of abuse of discretion on the part of the contracting officer in his attempt to secure further penetration of the piles for the east approach span of the bridge.

The cost to plaintiff of the required additional driving, including general overhead, profit, and bond premium, was $139.

8. The cost to plaintiff of the work on the east cofferdam, over and above what it would have cost had the difficulty in the work thereon, heretofore described, not been encountered, was, including general overhead, profit, and bond premium, $10,058.

9. The contract work was completed and accepted January 20, 1934. The allowance by the contracting officer of 61 days for excusable delay brought the contract time for completion from September 1 to November 1, 1933.

There are 80 calendar days from November 1, 1933, through January 20, 1934.

Article 3, section 1, division 1, of the specifications laid liquidated damages for inexcusable delay at $50 a day. For 80 days the liquidated damages amounted to $4,000.

In the Comptroller General's settlement on the contract March 4, 1935, there was withheld $4,000 from the amount otherwise due on the contract for liquidated damages, being 80 days as aforesaid at $50 a day.

The delay of 80 days is attributable to the difficulty encountered, as described, in the work on the east cofferdam.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiff seeks to recover $19,126 on the grounds—(1) that defendant in the specifications and drawings, which constituted a part of the contract between the parties, misrepresented the character of the materials which plaintiff would encounter in excavating for the two piers for the bridge over the branch channel of the Chesapeake and Delaware Canal at Delaware City, Delaware, and that this resulted in damages of $10,058 and delay for which defendant was responsible; and (2) that certain extra work was performed for which it was not fully paid.

The essential facts established by the record have been set forth in the findings and they show that the excess cost incurred by plaintiff by reason of the difficulties encountered by it in performing the work called for by the contract was $10,197 (findings 7 and 8). The evidence further shows, as set forth in finding 3, that the conditions encountered by plaintiff in excavating for the east pier were not different from what might reasonably have been expected from an examination of the contract specifications and drawings, including the log of borings as shown therein. Under this finding it is clear that plaintiff is not entitled to recover the cost of performing the work in excess of the estimate in its bid. The log of borings made by the defendant and the information gathered therefrom by the defendant were set forth for the

information of bidders, as described in finding 2. Most of the testimony introduced by both parties related to the accuracy or inaccuracy of description of the materials and conditions to be encountered as shown on the drawings and described in the specifications for the information of bidders. A study of that testimony convinces us that the information recorded by the defendant and made available to bidders fairly represented the nature of the material to be excavated and the conditions to be encountered. *Midland Land & Improvement Company* v. *United States*, 58 C. Cls. 671, 683, 686. The descriptive record made by defendant and furnished to the bidders was the best information the defendant could obtain from borings made; the wash boring material was carefully analyzed and the record of this analysis was all the information which defendant had. Nothing was concealed from the bidders. *Pawling & Co.* v. *United States*, 62 C. Cls. 123; *Blakeslee & Sons, Inc., et al.* v. *United States*, 89 C. Cls. 226; *General Contracting Corp.* v. *United States*, 88 C. Cls. 214, 247, 248; *Triest & Earle, Inc.*, v. *United States*, 84 C. Cls. 84, 91.

Paragraph 68 of the specifications stated that the log of borings shown on the contract plans was the best information which the United States had concerning the condition and character of material below the surface of the ground, and proceeded to warn bidders that "these data are only approximate and not guaranteed. The contractor must base his bid upon his own interpretation of the data."

Paragraph 67 of the specifications set forth that the material to be removed was believed by the defendant to be mud, sand, clay, gravel, and some sandstone and boulders, with possibly logs, other foreign materials and remains of old constructions, but bidders were expressly cautioned by this specification to "examine the site and decide for themselves as to the material to be excavated" and to "make their bids accordingly." The material encountered did consist of mud, sand, clay, gravel, and some sandstone.

The failure of the east cofferdam which gave rise to practically all the excess cost claimed was due to the fact that the sheet steel cofferdam piling was not driven far enough into the ground below the required depth for the pier excavation

to support the toe of the piling. As a result of the wet sandy condition of the soil at the bottom of the excavation and the failure of plaintiff to install sufficient timber walers inside the cofferdam near the bottom of the excavation, the sheet piling buckled inwardly at the bottom from outside pressure and the cofferdam was deformed.

In these circumstances we think the increased cost incurred by plaintiff by reason of the difficulties encountered was due to plaintiff's failure properly to interpret the data furnished by the defendant and not from any misrepresentation by the defendant or its failure to furnish plaintiff with all the information it had. *MacArthur Brothers Co.* v. *United States*, 258 U. S. 6.

As a result of the experience which plaintiff had with the east cofferdam, as above-mentioned, the plaintiff, before it drove the piling for the west cofferdam, redesigned that cofferdam, using longer and stronger steel for the piling and allowing a greater area for excavation instead of driving the piling to the neat lines as had been attempted in the east cofferdam. No difficulty was encountered with the west cofferdam.

At the bottom of the excavation for the west cofferdam, the contracting officer, as he had done in the case of the east cofferdam, concluded that the foundation of the concrete pier to be constructed inside the cofferdam should rest on piles, which were driven, and plaintiff was granted extra time for this work and was paid the agreed compensation therefor. The proof does not sustain plaintiff's claim that it should have been paid more.

The work called for by the contract was completed by plaintiff 141 days late. The contracting officer however found that the delay of 61 days was due to unforeseeable causes and held the plaintiff responsible for only 80 days of the delay for which liquidated damages at the date of $50 a day, as provided in the contract, were deducted. The evidence shows, and we have found as a fact, that the 80 days delay in completion of the work was attributable to the difficulties encountered by plaintiff in connection with the east cofferdam. On the evidence of record, the decision of the contracting officer holding plaintiff responsible for 80 days delay was

correct. Liquidated damages in the amount of $4,000 were therefore properly deducted under the provision of art. 9 of the contract.

Plaintiff is not entitled to recover and the petition will be dismissed. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

RODEN COAL COMPANY, INC., PLAINTIFF, AND WALTER F. DOWNEY, AS RECEIVER OF THE FIRST NATIONAL BANK AND TRUST COMPANY AF YONKERS, NEW YORK, INTERVENOR, v. THE UNITED STATES

[44255. Decided December 1, 1941. Plaintiff's motion and Intervenor's motion for new trial overruled February 2, 1942]

On the Proofs

Dredging of navigable channel; consequential damages to adjacent property.—Where the Government in 1937 commenced dredging operations in the navigable channel between the Hudson and East Rivers, known as the Harlem River Canal, adjacent to the property on the waterfront of said canal belonging to the plaintiff and used by the plaintiff as a coal yard; and where shortly thereafter cracks and breaks appeared in the surface of said coal yard, and the land began to settle before dredging operations in the vicinity were discontinued; it is *held* that there was no taking by the defendant, constructive or otherwise, of plaintiff's property; and that any damage to said property to which defendant's authorized dredging operations may have contributed was indirect and consequential to the exercise by the defendant of its lawful right in maintaining a navigable waterway, and plaintiff accordingly is not entitled to recover.

Same; just compensation; taking of property.—The defendant did not in any way encroach upon the property rights of plaintiff, and under the facts disclosed, there is no justification for application of the principle of a constructive taking upon which to base an implied promise to pay just compensation under the Fifth Amendment, measured either by the value

of the property or by the difference between the market value thereof before and after the operations by the defendant.

Same.—The plaintiff acquired the property subject to the undeniable right of the United States to maintain a navigable waterway at the authorized depth and width.

Same.—Whatever effect the defendant's dredging operations may have had upon plaintiff's property, the resulting damage was indirect and consequential to the exercise by the defendant of a lawful power. *United States* v. *Lynah*, 188 U. S. 445, and *United States* v. *Cress*, 243 U. S. 316, distinguished.

Same; claims under Acts of Congress.—The act of Congress authorizing the maintenance of the Harlem River Canal did not assume any obligation to pay for damages which might result to property owners as a consequence of such maintenance; and the claim of plaintiff cannot, therefore, be said to be one arising under an act of Congress.

Same.—In order for the Court of Claims to entertain a suit against the Government and to enter judgment the statute upon which the claim is based must grant the right asserted.

The Reporter's statement of the case:

Mr. John Jay McKelvey for the plaintiff.

Mr. Benjamin W. Moore for the intervenor.

Mr. Henry A. Julicher, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

Plaintiff seeks to recover $204,809 for the alleged taking by the defendant under the Fifth Amendment of plaintiff's coal yard property through dredging operations in the Harlem River Canal.

In the alternative plaintiff claims $89,162, representing the difference between the market value of the property before and after dredging operations by reason of alleged damage to the property and equipment thereon resulting from such dredging operations.

The defendant denies liability and insists that there was no taking of plaintiff's property and that under the facts disclosed by the record the defendant is not liable for any damage to plaintiff's coal yard property by reason of the collapse of plaintiff's bulkhead adjacent to the canal, even if the dredging operations caused or contributed to the giving away of the bulkhead.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. In 1933 the plaintiff, a New York corporation, acquired title in fee simple to a tract of land about 44,388 square feet in area, known as lots Nos. 99 to 114, inclusive, on map of 140 lots on Broadway, West 218th and adjacent streets and "water front on Harlem River," Borough of Manhattan, City of New York, dated April 23, 1920, signed by George C. Hollerith, 176 Broadway, filed May 24, 1920, in the New York Register's Office as No. 2014.

The property is described in the deed of conveyance also by metes and bounds and the boundary line at the waterfront is described as "the pier and bulkhead line approved by the Secretary of War on October 18, 1920."

2. Before and at the time of the loss and damage hereinafter described, the tract was used by plaintiff and its lessee as coal yards, with hoists, coal pockets, scales, offices, bins, cranes, screening plant, and other facilities appertaining to a coal yard. Coal was received by barge at the waterfront and by truck retailed to customers within a radius of approximately five miles.

A ramp led upward from the coal yards to Ninth Avenue, which was its southern boundary. The approach to Broadway Bridge over the waterway bounded the tract on the west.

3. The watercourse which separated Manhattan Island from the mainland in early historic times consisted of Harlem River and Spuyten Duyvil Creek, which met and joined at King's Bridge.

In 1873, pursuant to an act of Congress, a survey was undertaken by Government engineers looking to the improvement of Harlem River and, in this survey reported February 19, 1874, the desirability of a good waterway between Hudson River and East River by way of Harlem River and Spuyten Duyvil Creek was indicated. This waterway had for many years been used for navigation, except that at the junction of Spuyten Duyvil Creek and Harlem River at King's Bridge it contained very little water at low tide, and was about 6 feet deep at high tide.

As early as 1876 the Government engineers were investigating the feasibility, among other plans, of shortening the

waterway by cutting a canal across Dyckman's Meadows, in this way avoiding a roundabout loop formed by the approaches to the confluence at King's Bridge. Congress, however, would not authorize this short cut until the necessary land was secured to the United States free of cost.

By 1887 legal difficulties interposed against the project were surmounted, the land was secured free of cost to the United States and preliminary work was undertaken on the cut through Dyckman's Meadows.

The cut through Dyckman's Meadows was completed in 1895. In 1907 a channel 15 feet deep and 150 feet wide was dredged from Macomb's Bridge (at about 155th Street) to Broadway Bridge, passing along the frontage of the site here involved. The project adopted by Congress and reflected in regulations under acts of Congress, modified from time to time, provided for a channel through Dyckman's Meadows of 350 feet in width and 18 feet in depth. The project as a whole, from Long Island Sound to Hudson River by way of Harlem River, the Dyckman's Meadows cut-off, and Spuyten Duyvil Creek, called in general for a minimum channel depth of 15 feet, and the entire waterway was subject to the ebb and flow of tides.

The site of the Roden Company's coal yard was at the junction of Harlem River and Dyckman's Meadows cut-off, and its waterfront, the line established by the Secretary of War October 18, 1920, was also the boundary of land that had been taken in condemnation proceedings in 1886 for the use of the United States in creating the Dyckman's Meadows cut-off. The property in question, on which plaintiff's coal yard and facilities were constructed, ever since the completion of the cut-off in 1895 has fronted on a navigable artificial waterway.

The channel in front of plaintiff's property has been maintained by the Government at a minimum depth of 15 feet since 1907 by intermittent dredging, with varying width.

For a fair use of the coal yard a minimum depth of 11 feet at the bulkhead was necessary, although at that depth coal barges at low tide would rest on the bottom.

4. Following earlier dredgings, the Government, in the improvement of navigation on Harlem River and the waterway connecting it with Hudson River, dredged the waterway in the general vicinity of Roden Company's coal yard April 16 to 27, 1926, and November 29, 1929 to January 13, 1930.

On plaintiff's application the War Department issued a permit November 18, 1931, authorizing the then owner of the property to place steel sheet piling along the face of the existing bulkhead, which had the effect of increasing plaintiff's encroachment on the pierhead and bulkhead line established by the Government October 18, 1920, from 2 feet 7 inches to 3 feet. This piling was in due course placed about 128 feet westward from the eastern boundary of the coal yard, that is, towards Hudson River.

Further dredging operations by the Government were commenced close to plaintiff's bulkhead November 1, 1937. On that date plaintiff's president communicated with the Government's engineer in charge by telephone and stated that he was fearful that the dredging would damage the company's bulkhead. The Government engineer examined the site early in the morning of November 3, 1937, and discovered that an old crack on plaintiff's land, closed or partially closed in the course of time, was again opening up. Thereupon the dredge was removed from alongside the bulkhead, where it had been operating, to a position midstream, from which it worked gradually shoreward toward the bulkhead, the inspector for the Government in the meantime watching the effect of the dredging upon the bulkhead. November 18, 1937, it was discovered by the inspector that the earth shoreward of the bulkhead had settled about one foot, and that plaintiff was endeavoring to prevent further inclination channelward of the wood and steel sheet piling face of the bulkhead by the use of steel tie rods, the steel sheet piling having apparently likewise been affected by the dredging and thereby subjected to a channelward thrust. Thereupon dredging operations in the vicinity of plaintiff's bulkhead were discontinued.

No dredging in front of plaintiff's property has ever exceeded the authorized project dimensions or the reasonable needs of navigation.

5. The repairs to the bulkhead made in 1931 or shortly thereafter were a part of other repair work made necessary by a settlement that had followed the dredging of 1929–1930. There had been some settlement following the dredging operations of 1926, but not of a serious nature. By the year 1937 it was apparent that dredging close to plaintiff's bulkhead would place the coal yard in danger of subsidence through failure of the bulkhead piling to hold.

6. The dredging of November 1937 did in fact cause a subsidence of plaintiff's coal yard and disintegration of the wooden portion of the bulkhead and cribbing back of the bulkhead to such an extent as materially to damage the coal yard and make useless a substantial part thereof. The dredging had the effect of weakening the foundation support of the bulkhead piling which was of insufficient depth below the bottom of the river or of sufficient strength to withstand loss of material at its base, letting the fill back of the bulkhead slide down and into the waterway, forcing the major part of the bulkhead ahead of it, and, when the subsidence had taken place, exposing a portion of the coal yard to flooding and erosion of high tides.

7. The fair and reasonable cost of repairing and reconstructing the property constituting that part of plaintiff's coal yard, damaged or lost through the collapse of a portion of the bulkhead following the dredging operations of November 1937, fixed as of the time of loss or damage, is $45,044.

No part of the property so lost or damaged has been taken possession of by the defendant, it has not been repaired or reconstructed, and the plaintiff has not been compensated in whole or in part for the loss or damage.

8. The fair market value of plaintiff's coal yard, the land and improvements, immediately before the loss and damage was $204,809, immediately thereafter $115,647, a decrease in fair market value of $89,162.

9. Neither the Government nor any of its agents in the preparation of plans for dredging the Harlem River had

any intention thereby to disturb the bulkhead or natural elevation or grade of plaintiff's land or any reason to expect that such a result would follow. Neither the United States nor any of its agents in fact used, occupied, invaded, or encroached upon plaintiff's land, or any part thereof, during dredging operations or at any time thereafter. The level of the river has not been raised or lowered by the United States and all dredging under the contract was performed in a workmanlike manner and was for the purpose and benefit of navigation by maintaining a 15 foot channel in accordance with law. The plaintiff continues its ownership of the land and facilities and continues to use the same, except that small area which caved in and settled, and is under water at high tide. The sunken area covered by water only at high tide is susceptible of reclamation by bulkheading and backfilling up to the ground elevation or grade existing at the time the bulkhead gave way in 1937. The plaintiff's damages were indirect and consequential due to its failure to maintain an adequate bulkhead and to its neglect to install sufficient foundations for its coal pockets, derrick, and other heavy shore equipment.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiff insists that the facts in this case require the court to hold (1) that there was a constructive taking by the defendant either of the fee of the entire property of plaintiff, or a part thereof, or of a right therein, such as an easement of overflow or of slope; or (2) that the defendant is liable to plaintiff for loss and damage sustained by it by reason of dredging operations performed pursuant to an Act of Congress and that, in either case, the measure of the amount recoverable is the same.

We are of opinion that plaintiff is not entitled to recover for the reason that there was no taking by the defendant, constructive or otherwise, of plaintiff's property, and that any damage which may have resulted to plaintiff's property through the failure of its bulkhead, to which failure the

defendant's authorized dredging operations may have contributed, was indirect and consequential to the exercise by the defendant of its lawful right in maintaining a navigable waterway.

The plaintiff company was incorporated in 1925 and in April 1933 acquired title to the property in question, which consisted of a coal yard and certain equipment elevated considerably above the water surface of the Harlem River and supported along the edge of the waterway by a bulkhead consisting in part of wooden piles and in part of wood and sheet steel piles and cribbing. The coal yard in question had been built up by plaintiff and its predecessors in title so as to bring the surface of the property level with the top of the bulkhead.

The tract of land embraced within the coal yard in question consisted of about 44,388 square feet known as lots 99–144 located on the northerly side of West 221st Street, Borough of Manhattan, City of New York, extending to the southerly line of the Harlem River and bounded on the west by the easterly line of Broadway and on the east by the property of the Bradley-Mahoney Coal Corporation. The property extends along the bulkhead line of the Harlem River a distance of 468 feet, about 100 feet landward, with a frontage on Ninth Avenue of 415 feet. The watercourse, now known as the Harlem River, separating Manhattan Island from the mainland, consists of Harlem River and Spuyten Duyvill Creek making a continuous waterway about eight miles in length forming a tidal estuary between the Hudson and East Rivers. The two streams originally met at King's Bridge where the water, at high tide, was six feet deep.

In 1873, pursuant to an Act of Congress, the Government made a survey looking to improvement of Harlem River and, as a result of that survey, reported in February 1874 the desirability of a waterway navigable at all times by way of Harlem River and Spuyten Duyvill Creek. In 1876 the Government, through its engineers, was investigating the possibility of improving the waterway by cutting a channel across Dyckman's Meadows so as to eliminate

the loop formed by approaches to the confluence of the Harlem River and Spuyten Duyvill Creek at King's Bridge. However, Congress did not make any funds available for the work of excavating the channel through Dyckman's Meadows until the necessary land and rights incident to construction of the channel had been secured to the United States free of cost. By 1887 the necessary land and rights had been obtained by the United States free of cost, and Congress, in that year, made an appropriation of funds and authorized the construction of the canal through Dyckman's Meadows for the purpose of making Harlem River and Spuyten Duyvill Creek navigable at all times throughout the distance between the Hudson and East Rivers. In 1895 the cut through Dyckman's Meadows was completed and in 1907 a navigable channel 15 feet deep and 150 feet wide was dredged between the Hudson and East Rivers. This channel passed along the frontage of what is now the plaintiff's property. Prior to construction of the cut through Dyckman's Meadows and the dredging of the entire channel between the Hudson and East Rivers, the United States had obtained from the then owners of the property involved in this suit titles to such property and property rights as were necessary to the construction and maintenance of the canal through Dyckman's Meadows, including any rights adjacent to the actual dimensions of the navigable channel that might be affected by construction of the navigable waterway.

The record in this case does not show when the bulkhead supporting the property in question along the edge of the navigable waterway was constructed. Percy Roden purchased a part of the property in question in 1923 and the balance in 1924. At the time of this purchase he transferred the property to G. M. Roden & Son, a corporation, all the stock of which was owned by plaintiff and his father. In 1926 Percy Roden purchased the interest of his father in G. M. Roden & Son and thereafter, in 1933, the Roden Coal Company, Inc., all the stock of which he owned, acquired title to the property in question and has owned the same since that time.

Percy Roden purchased the property from the Rapid Transit Construction Company in 1923. At that time, and for a number of years prior thereto, the property had the same bulkhead constructed of wooden piles and cribbing to support the yard which had been constructed landward of the Harlem River. The Transit Company had owned and used the property since about 1900 for unloading barges and for storage on the property of material used by that company in its construction work.

For some time prior to 1925 the property in question had been used under lease by the Ames Transfer Company, a dealer in building materials, for unloading and storing, and for delivery of building materials such as sand, gravel, brick, and other building materials. Prior to the date plaintiff acquired title to the property in 1933 it occupied same under a lease from G. M. Roden & Son at a rental of $1,000 a month, plus taxes and interest on a mortgage of $125,000. Soon after the property was acquired by Percy Roden in 1923–1924 certain facilities, such as scales and an office building, were constructed on the property and in 1926 large coal pockets and hoppers were constructed for handling coal of all kinds through bins. Cranes and a hoisting plant, with a steam hoist and boiler, to remove coal from barges to the receiving hopper on top of the coal pockets were also constructed. In addition there was constructed a re-screening plant. The construction of these large facilities greatly increased the load which the bulkhead had to bear. At that time the dock along the channel was also enlarged and extended. The waterfront of the property in question, represented by the line established by the Secretary of War October 18, 1920, was also the boundary of the land to which title in fee had been taken by the United States July 10, 1886, in condemnation proceedings for the use of the United States in constructing the cut-off channel 15 feet deep and 150 feet wide as a part of the navigable waterway between the Hudson and East Rivers, as hereinbefore mentioned. Ever since the completion and dredging of the cut-off channel in 1907 the property now owned by plaintiff, including the bulkhead which appears to have been

first constructed about 1900, has fronted on a navigable artificial waterway of a minimum depth of 15 feet which the Government has maintained by dredging operations. Following the earlier dredgings, the defendant in maintaining and improving navigation on the waterway connecting the Hudson and East Rivers dredged the channel in the general vicinity of the property involved in this case from April 16 to 27, 1926, and from November 29, 1929, to January 13, 1930. In these dredging operations the defendant did not in any way encroach upon the property in question. There was some settlement of the ground landward of the bulkhead following the 1929–1930 dredging, but such settlement was not of a serious nature. This settlement was due to pressure on the bulkhead shoreward thereof which tended to push the top of the wooden piling riverward by reason of inadequate support for the piling at its base.

In 1931 plaintiff's predecessor in title, with the permission of the Secretary of War, placed additional steel piling along the face of the existing piling bulkhead for a distance of 128 feet westward from the east boundary of the property in question. The failure or collapse of the wooden portion of the bulkhead following the 1937 dredging operations of the defendant, hereinafter mentioned, was west of the additional steel piling installed by the owner of the property in 1931.

November 1, 1937, following the letting by the defendant of contracts for the dredging of numerous areas in the channel, the Government commenced dredging operations close to plaintiff's property, and on November 3 it was found that cracks had developed in the coal yard land shoreward by reason of the wooden portion of the bulkhead being forced riverward. The dredge was immediately removed to a point in midstream where it continued operations. The land shoreward of the bulkhead continued to crack and by November 18 the surface of the coal yard, where the break in the ground had occurred, had settled about a foot; thereupon the defendant stopped all dredging operations in Area 20. The defendant did not in any of its dredging operations in 1937, or prior thereto, exceed the authorized

and legal dimensions of the waterway, or exceed the reasonable needs of navigation. The level of the river was not and had not been raised or lowered by the United States or its agents.

From the foregoing it is clear that the defendant did not in any way encroach upon any property rights of plaintiff, and, under the facts disclosed, there is no justification for application of the principle of a constructive taking upon which to base an implied promise to pay just compensation under the Fifth Amendment, measured either by the value of the property or by the difference between the market value of the property before the wooden portion of the bulkhead collapsed and the market value thereof afterwards. The plaintiff acquired the property subject to the undeniable right of the United States to maintain a navigable waterway at the authorized depth and width. The damage to plaintiff's coal yard property was due to inadequate foundation support for the wooden bulkhead piling by reason of the age of the bulkhead, the natural effect of the water in the navigable channel, and the pressure on the bulkhead on the landside thereof. It is true that the bulkhead in part had been there since about 1900, and before the channel was dredged to the authorized depth and width along the property in question in 1907, but the United States was not a guarantor of the adequacy of the bulkhead. When plaintiff acquired the property it acquired it subject to the existing rights of the United States, and plaintiff did not acquire any right to prevent the United States from properly maintaining the navigable waterway or to compel it to answer for any damage that might result from collapse of the bulkhead by reason of proper maintenance of the waterway by the defendant.

The damage resulting to plaintiff's property was due to plaintiff's failure to maintain an adequate bulkhead. Such damage was not the result of the taking by the defendant of any property rights of plaintiff, and whatever effect the defendant's dredging operations may have had upon plaintiff's bulkhead, the resulting damage because of its collapse

was indirect and consequential to the exercise by the defendant of a lawful power.

Plaintiff relies chiefly upon the opinions in *United States* v. *Lynah*, 188 U. S. 445, and *United States* v. *Cress*, 243 U. S. 316. But it is clear that the decisions in those cases, as explained and applied in *United States* v. *The Chicago, Milwaukee, St. Paul and Pacific Railroad Company, et al.*, 312 U. S. 592, do not support the claim of this plaintiff under the facts disclosed.

With reference to plaintiff's other contention that it should be given judgment for the loss and damage sustained because the Government's dredging operations were carried on pursuant to an Act of Congress, it is sufficient to say that the Act authorizing the maintenance of this waterway did not assume any obligation to pay damages which might result to property owners, situated as was plaintiff, as a consequence of such maintenance operation. The claim cannot, therefore, be said to be one arising under a law of Congress. In order for this court to entertain a suit and enter judgment upon a claim arising under a law of Congress, the statute upon which the claim is based must grant the right asserted. The acts under which the dredging operations in 1937 and prior years were carried on clearly did not, expressly or impliedly, confer upon plaintiff the right to be compensated for damages, even if such damages had directly resulted from the authorized dredging operations by the Government within the limits of its own property.

The plaintiff's petition and the petition of the intervenor will be dismissed and it is so ordered.

MADDEN, *Judge;* JONES, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

Syllabus

MENOMINEE TRIBE OF INDIANS v. THE UNITED STATES

[No. 44294. Decided December 1, 1941. Defendant's motion for new trial overruled February 2, 1942]

On the Proofs

Indian claims; compensation for "swamp lands" under the treaty of 1854.—Where under the provisions of the treaty of May 12, 1854, the defendant gave to the plaintiff Indians for a home a tract of land upon Wolf River in the State of Wisconsin, definitely described by metes and bounds, and containing 12 specific townships; and where prior to the signing of said treaty the Congress had passed what is known as the "Swamp Land Act of 1850," by the terms of which the swamp and overflowed lands of Arkansas and all other States, including Wisconsin, were granted to the several States; and where it is shown that there are swamp lands located within the boundaries of the reservation given to the Menominees by the treaty of 1854; it is *held* that the plaintiff is entitled to recover the acquisition costs of such lands which were within the boundaries of the cession to the plaintiff by the treaty of 1854 but which had been theretofore given to the State of Wisconsin by the act of 1850, together with the value of that portion of the timber which has been removed therefrom and for which plaintiff has not been paid; provided, however, in accordance with the terms of the jurisdictional act, that the United States "may in lieu of paying the present acquisition costs of such lands acquire and hold said lands in trust for the sole benefit and use of the Menominee Tribe of Indians."

Same; contractual rights under treaty.—Where under the decision in *United States* v. *Minnesota*, 270 U. S. 181, the title to the swamp lands embraced in the reservation ceded to the plaintiff tribe in 1854 is in the State of Wisconsin, having been granted to that State *in praesenti* by the act of 1850, subject only to identification by the Secretary of the Interior and patent to be issued on the request of the Governor; and where under the terms of said decision neither the Indians nor the United States on behalf of the Indians could maintain a suit against the State of Wisconsin for the legal title to the swamp lands in question; it is *held* that these considerations do not affect the contractual rights between the plaintiff and the defendant under the treaty of 1854.

Same.—The plaintiff Indians had purchased certain lands from the United States, had paid a valuable consideration therefor,

said lands had been described by metes and bounds, and no reservation or exception had been made of any lands embraced within the boundaries of said tract.

Same; Indian Treaties liberally construed.—Treaties between the United States and the Indian Tribes must be construed liberally in behalf of the Indians in view of the relationship existing between the parties.

The Reporter's statement of the case:

Mr. Ernest L. Wilkinson for the plaintiff. *Messrs. Dwight, Harris, Koegel & Caskey, Andrew E. Stewart,* and *John W. Cragun* were on the briefs.

Mr. Walter C. Shoup, with whom was *Mr. Assistant Attorney General Norman M. Littell,* for the defendant. *Mr. Raymond T. Nagle* was on the brief.

The court made special findings of fact as follows:

1. This is one of the several suits brought pursuant to the Act of Congress approved September 3, 1935 (49 Stat. 1085), as amended by the Act of Congress approved April 8, 1938 (52 Stat. 208), conferring jurisdiction upon this court to hear, determine, adjudicate, and render final judgment on all legal or equitable claims of whatsoever nature which plaintiff may have against defendant growing out of any treaties, agreements, or laws of Congress or wrongful handling of the land, timber, or other property belonging to plaintiff tribe or held in trust for it by the United States or otherwise—

> * * * including, but without limiting the generality of the foregoing, (1) a claim for damages for swamp lands which the United States allegedly purported to convey to the Menominee Tribe of Indians by a treaty ratified May 12, 1854 (10 Stat. L. 1064), but which the United States allegedly did not convey because of already having conveyed the same to the State of Wisconsin (9 Stat. L. 519); * * *
>
> Sec. 6. (a) If it shall be determined by the court that the United States in violation of the terms and provisions of the treaty ratified May 12, 1854 (10 Stat. L. 1064), unlawfully failed to convey certain swamp lands to the Menominee Tribe of Indians the court shall render judgment in favor of the Menominee Tribe of Indians for a sum equal to (1) the value of the timber removed therefrom since May 12, 1854, with interest at 4 per centum

per annum from the time of such removal and (2) the present acquisition costs of such lands to the Menominee Tribe of Indians, which shall be determined by the court, with a proviso that the United States may in lieu of paying the present acquisition costs of such lands acquire and hold said lands in trust for the sole benefit and use of the Menominee Tribe of Indians.

The petition was filed on December 1, 1938.

2. By the treaty of October 18, 1848 (9 Stat. 952), plaintiff Indians ceded, sold, and relinquished to defendant "all their lands in the State of Wisconsin, wherever situated." In return therefor the defendant agreed to give to the Menominees for a home, all that tract of land ceded to the United States by the Chippewa Indians of the Mississippi and Lake Superior, and the Pillager band of Chippewas, in the treaties of August 2 and August 21, 1847, respectively, and which had not been assigned to the Winnebago Indians under the treaty of October 13, 1846, which tract was guaranteed to contain not less than 600,000 acres.

As a further consideration the defendant agreed to pay $350,000.00 additional in the manner set out in detail in Article IV of said treaty, it being agreed that a portion of such sum should be used to pay the costs of removal, a year's subsistence, and other items named in Article IV, the balance of $200,000.00 to be paid to the Indians in ten equal annual installments.

Article VIII of the treaty provided that the Indians should be permitted, if they so desired, to remain on the lands ceded for and during the period of two years from the date of the treaty "and until the President shall notify them that the same are wanted."

3. An exploring party (contemplated by Article 6 of the treaty of 1848), formed in 1850 to explore the lands west of the Mississippi, found the lands which had been ceded to the Menominees to be unsuited to their circumstances. Although the removal of the Menominees from Wisconsin at the end of the two-year period fixed in the treaty of 1848 had been ordered, the Menominees in 1850 petitioned the President for leave to stay longer.

4. In 1850 the Congress passed what is known as the "Swamp Land Act" approved September 28, 1850 (9 Stat. 519) which reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby, granted to said State.
>
> SEC. 2. *And be it further enacted*, That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the State of Arkansas, and, at the request of said governor, cause a patent to be issued to the State therefor; and on that patent, the fee simple to said lands shall vest in the said State of Arkansas, subject to the disposal of the legislature thereof: *Provided, however*, That the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied, exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid.
>
> SEC. 3. *And be it further enacted*, That in making out a list and plats of the land aforesaid, all legal subdivisions, the greater part of which is "wet and unfit for cultivation," shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom.
>
> SEC. 4. *And be it further enacted*, That the provisions of this act be extended to, and their benefits be conferred upon, each of the other States of the Union in which such swamp and overflowed lands, known and designated as aforesaid, may be situated.

5. By successive orders of the President, the time for the Menominees to remove from the lands in Wisconsin upon which they resided at the time of the treaty of 1848 was extended to October 1, 1852.

6. In view of the great reluctance shown by the Menominees to leave Wisconsin and take up their new lands west of the Mississippi, Elias Murray, Superintendent of Indian Affairs, was ordered by the Commissioner of Indian Affairs

in June 1851 to make a full study and report of the condition of the Menominees. Subsequently, Mr. Murray explored in September 1851 a northern location in Wisconsin for the Menominee Indians, being lands on the Wolf and Oconto Rivers north of those on which they then temporarily resided. Three chiefs of the Menominees accompanied Mr. Murray on the exploring party, which was by boat since there were no roads. The location explored and recommended by Mr. Murray was a tract 30 by 18 miles, to correspond with the public surveys, embracing Townships 28, 29, and 30 North, Ranges 15 to 19, inclusive, East (4th P. M.)—fifteen townships all told.

7. By treaty of May 12, 1854 (10 Stat. 1064), the Menominees ceded to the United States the lands west of the Mississippi River acquired by them by the treaty of 1848, and as a consideration therefor, the United States ceded to the Menominees for a home twelve townships of land in Northern Wisconsin as follows:

> ARTICLE 2. In consideration of the foregoing cession the United States agree to give, and do hereby give, to said Indians for a home, to be held as Indian lands are held, that tract of country lying upon the Wolf River, in the State of Wisconsin, commencing at the southeast corner of township 28 north of range 16 east of the fourth principal meridian, running west twenty-four miles, thence north eighteen miles, thence east twenty-four miles, thence south eighteen miles, to the place of beginning—the same being townships 28, 29, and 30, of ranges 13, 14, 15, and 16, according to the public surveys.

8. In ceding the land described in Finding 7 to the Menominees the United States made no reservation of the swamp lands that were included within the boundaries of the tract, nor was any reference made to them in the treaty. In fact, the then Commissioner of Indian Affairs, George W. Manypenny, in a letter of instructions to the Superintendent of Indian Affairs, dated April 5, 1854, stated that the number of acres included within the tract which was to be ceded by the treaty if negotiated, was 276,480 acres, and that this quantity was ample for all the wants of the Indians. The twelve full townships which were actually included in

the treaty as indicated in the letter contained 23,040 acres each, or a total of 276,480 acres.

9. By the treaty of February 11, 1856 (11 Stat. 679), the Menominee Tribe ceded to the United States "a tract of land, not to exceed two townships in extent, to be selected in the western part of the present reservation on its south line, * * * for the purpose of locating thereon the Stockbridge and Munsee Indians, and such others of the New York Indians as the United States may desire to remove to the said location within two years" from the ratification of the treaty. Thereafter, the two townships in the southwestern corner of the Menominee Reservation, being Township 28 North of Ranges 13 and 14 East of the fourth principal meridian, were selected for the purpose specified in the treaty and the Stockbridge and Munsee Indians removed thereto.

10. By Patent No. 8 Menasha Series, November 13, 1865, the United States formally granted to the State of Wisconsin swamp lands within the boundaries of the Menominee Reservation, as follows:

Township North	Range East	Number of acres
29	13	720
30	13	2,080
29	14	400
30	14	1,560
30	15	120
28	16	2,672.52
29	16	4,981.64
30	16	2,741.98
Total		15,276.14

11. It is conceded by both parties that there are probably additional swamp lands located within the tract ceded to the Menominee Indians by the treaty of 1854. However, the Secretary of the Interior has never complied with the directions set out in the act approved September 28, 1850, *supra*, to "make out an accurate list and plats of the lands" (swamp lands) and no patent for such additional lands has been issued to the State of Wisconsin. The extent and location of such additional swamp lands have not been definitely determined.

12. During the logging season of 1897–1898, the United States cut about 1,044,500 board feet of pine timber from lands patented to the State within the Menominee Reservation. The timber was sold by the United States for $13.60 per thousand feet and in turn sold by the purchaser to one Hollister. The logs were replevied by the State of Wisconsin, which returned them to Hollister upon his giving bond to the State and to the United States. The United States and the State of Wisconsin appointed agents to scale the timber removed, who reported the cutting of the timber and its sale as above set forth; and the United States, through the formal action of the Secretary of the Interior, assented to the payment for the timber being made to the State of Wisconsin, instead of to the United States for the account of plaintiff Indians, as a result of which $9,548.10, less $4,667.10 for cutting and banking, was paid to the State of Wisconsin.

13. The defendant on December 17, 1910, directed that no timber should be cut from lands patented to the State of Wisconsin as swamp lands within the Menominee Reservation.

14. Under date of February 28, 1930, the State of Wisconsin forwarded swamp land selection lists for lands within the Menominee Reservation consisting of (a) a list selected by the Commission composed of C. M. Foresman and H. C. Darragh (appointed by agreement between the Governor of Wisconsin and the Secretary of the Interior to investigate the claims of the State of Wisconsin to additional swamp land, the Commission making a report dated August 13, 1881, but upon which report the Secretary of the Interior took no further action) and totalling, as the State claimed, 4,403.03 acres in the following sections: Township 28 N., Range 16 E.; Townships 29 N., Ranges 13, 14, and 16 E.; and Townships 30 N., Ranges 13, 14, 15, and 16 E. (4th P. M.); and (b) a list (comprising lands selected by the agents of the State, Hubert Wyman and C. M. Foresman, on February 27, 1898) in the following townships: Township 28 N., Range 15 E.; Township 29 N., Range 15 E., claimed by the State to total 6,591.66 acres. The Indian Office, at the suggestion of the General Land Office, filed a protest against action on the State's selections.

15. A considerable quantity of timber has been removed from swamp lands lying within the boundaries of the present Menominee Reservation. Apparently in every instance, with the single exception mentioned in Finding 12, the proceeds from such timber have been paid to, or expended for, the benefit of the Menominee Indians or retained by the Government pending the settlement of the swamp land controversy with the State of Wisconsin. From June 30, 1930, to June 30, 1940, timber of the value of $2,744.31 was cut by the Menominee Indian Mills from swamp lands claimed by the State of Wisconsin, and that amount was deposited in the Treasury of the United States to the credit of the Menominee Tribe with other revenues from timber operations.

16. In 1935 representatives of the Secretary of the Interior and of the State of Wisconsin agreed that the State would sell to the United States, on behalf of the Indians, the swamp lands and timber thereon at a price agreed upon. Congress, however, has not appropriated the necessary funds for carrying out such agreement, and the agreement has, therefore, never been consummated.

The court decided that under the terms of the jurisdictional act the plaintiff was entitled to recover; subject, however, to the deduction of off-sets, if any, and reserving the determination of the amount of recovery and the amount of off-sets, if any, for further proceedings, as provided in Rule 39 (a) of the court.

JONES, *Judge*, delivered the opinion of the court:

The Menominee Tribe of Indians instituted this suit to recover the acquisition costs of swamp lands located within the borders of the reservation which was ceded to it by the defendant under treaty. It also seeks to recover the value of the timber removed by the defendant from such swamp lands since the date of the treaty, May 12, 1854 (10 Stat. 1064).

Prior to the negotiation of the treaty which forms the basis of this suit, the plaintiff tribe of Indians had "ceded, sold, and relinquished" to the defendant all its lands in the State of Wisconsin wherever situated, and the defendant had agreed to give to the plaintiff Indians another tract of land and certain sums of money.

After considerable investigation and exploration the treaty of May 12, 1854, *supra*, was entered into. By the terms of Article 2 of such treaty the defendant gave to the plaintiff Indians for a home a tract of land upon Wolf River in the State of Wisconsin, definitely described by metes and bounds, and containing 12 specific townships.

Prior to the signing of such treaty the Congress had passed what is known as the "Swamp Land Act" of 1850 (9 Stat. 519), by the terms of which the swamp and overflowed lands lying in the State of Arkansas were granted to that state, the lands to be identified and listed by the Secretary of the Interior, and patent to be issued upon request of the Governor of that state. *The law stipulated that its provisions should be and they were extended to all the other states.*

There are swamp lands located within the boundaries of the reservation which was given to the Menominees by the treaty of 1854.

The question is whether the plaintiff is entitled to recover for these lands which were within the boundaries of the cession to the plaintiff by the treaty of 1854, but which had been theretofore given to the State of Wisconsin by the act of 1850, *supra*, to be listed, identified, and patented in the manner indicated.

We think the so-called "swamp lands" were included in the lands ceded to the Menominees for a home by the treaty of 1854, and that plaintiff is entitled to recover under the jurisdictional act.

The lands conveyed to the Indians are definitely described by metes and bounds in the treaty of cession. The tract of land, when all the acreage is included, is less than the tract which the Indians had surrendered.

The basis, the background, the previous history, and the negotiations leading up to the treaty show that the Indians were desirous of securing hunting lands and that the swamp lands were particularly suited for this purpose, being filled with all kinds of game.

Under direction of the Commissioner of Indian Affairs, Elias Murray, Superintendent of Indian Affairs, made a full study and reported on the condition of the Menominees in 1851. He reported that the Indians were "highly satisfied

with the location I have recommended." He made special reference to the swamp areas and to the fact that "Bears, Foxes, and Martins appear to inhabit these Swamps." The interpreter who accompanied the party and who was told to explore the area east of the Wolf River in the company of the Indian chiefs, reported that they had "found a number of Cedar and Tamarack swamps where are many signs of Bears, deer, and other games" and that "the chiefs are highly pleased with the Country and say they hope the President will give it to them for a home."

While the survey covered a larger area than was finally ceded to the plaintiff tribe, it was in the same general section of the country and included most of the territory that was finally ceded by the treaty of 1854.

These facts are mentioned to indicate that a part of the inducement for the moving of the Indians from their former home to their new home, and one of the reasons for entering into the new treaty was the fact that the tract in question contained swamp lands which were suitable for hunting.

When this is followed by a treaty which without reservation definitely transfers by metes and bounds a tract that is smaller than they had formerly owned, and which was based upon a letter of instructions from the Commissioner of Indian Affairs stating that it contained 276,480 acres, which was the exact acreage contained within the 12 townships including all the swamp lands, as well as all other lands, it becomes manifest that the contract included all the lands within the boundaries specified in the treaty.

In 1923 the United States, in behalf of the plaintiff tribe of Indians, filed suit against the State of Wisconsin to cancel the patent relating to swamp lands within the Indian reservations, including that of the Menominees, and to remove the cloud on the title of the Indians.

In the same year a similar suit was brought against the State of Minnesota. In that case, *United States* v. *Minnesota*, 270 U. S. 181, the Supreme Court held that the State of Minnesota had taken title to the swamp lands by the act of 1850, and that the inclusion of such lands within the boundaries of the tract described in the subsequent treaty of cession did not operate to convey the legal title to the Chippewas.

The defendant relies upon the decision in the latter case to support its contention that since the swamp lands had actually been transferred by the act of 1850, subject only to identification and patent as such, the plaintiff tribe had acquired no interest therein and the defendant had incurred no obligation relative thereto by the treaty of cession.

After the decision in the Minnesota case the defendant dismissed its suit against the State of Wisconsin.

There is no doubt that under the decision in the Minnesota case the title to the swamp lands embraced in the reservation ceded to the plaintiff tribe in 1854 is now in the State of Wisconsin, having been granted to that state *in praesenti* by the act of 1850, subject only to identification by the Secretary of the Interior and patent to be issued on the request of the Governor. Undoubtedly if the defendant had pressed the Wisconsin case instead of dismissing it, the decision in the Minnesota case would have been controlling.

Under the terms of that decision neither the Indians nor the United States on behalf of the Indians could maintain a suit against the State of Wisconsin for the legal title to the swamp lands in question. However, this does not touch upon the contractual rights between the defendant and the plaintiff. Whether or not a suit could be maintained for the legal title to the swamp lands in question, the facts remain that the plaintiff Indians had purchased certain lands from the United States; that they had paid a valuable consideration therefor; that the land had been described by metes and bounds; and that no reservation or exception had been made of any lands embraced within the boundaries of the tract.

While there is some language in the Minnesota decision which would tend to indicate that lands theretofore transferred were not included within the treaty of cession, even though within its borders, that discussion was in the light of the contest over the legal title and the statements were made as bearing on the question of whether the United States or the State of Minnesota had the legal title to the land. It in no sense touched upon the obligation which the United States owed the plaintiff Indians under the terms of the treaty of 1854.

The very fact that the United States saw fit to file suit in behalf of the Indians against the State of Wisconsin to cancel the title to the swamp lands is a strong indication that the Government recognized its obligation to the Indians in connection with such swamp lands; in other words, it had conveyed such lands to the State of Wisconsin by the act of 1850, and had again undertaken to convey the same lands to the Indians by the treaty of 1854.

It is not necessary to discuss the relationship existing between the defendant and the various Indian tribes. This has been discussed repeatedly and it is well settled that treaties must be construed liberally in behalf of the Indians, in view of the relationship which exists between them and the defendant.

Considering the events and transactions leading up to the treaty of 1854, as well as the text of the treaty itself, the plaintiff is entitled to recover the acquisition costs of such swamp lands, together with the value of that portion of the timber which has been removed therefrom and for which the plaintiff has not been paid; provided, however, in accordance with the terms of the jurisdictional act, that the United States "may in lieu of paying the present acquisition costs of such lands acquire and hold said lands in trust for the sole benefit and use of the Menominee Tribe of Indians."

Only 15,276.14 acres have actually been patented to the State of Wisconsin. Defendant insists that recovery in any event should be limited to the acquisition costs of this definite acreage. We do not think so.

It is conceded that there are additional swamp lands within the reservation. At different times two lists were filed with the Secretary of the Interior, one by a joint commission appointed by the Governor of the State of Wisconsin and the Secretary of the Interior, and the other prepared by officials of the State of Wisconsin. The State of Wisconsin has repeatedly demanded a patent to these lands. Whether the failure of the Secretary of the Interior to perform the purely ministerial duty of designation was due to an effort to protect the Indians in the use of lands which were transferred to the State of Wisconsin by the Act of 1850, or for some other reason, is not clear. When he fails to perform such a duty it does not defeat the purpose of the act. As

was stated by the Supreme Court in the case of *Wright* v. *Roseberry*, 121 U. S. 488, 509, in which a similar question affecting swamp lands was involved, "when that officer has neglected or failed to make the identification" it is proper "to identify the lands in any other appropriate mode which will effect that object." Several efforts to adjust the matter have been made, including an agreement between the proper state officials and the Secretary of the Interior for a sale and transfer by the State of Wisconsin to the United States in trust for the Indians. This agreement failed for lack of necessary funds. Decades have passed. It is a continuing source of irritation. There should be an end to the controversy.

The jurisdictional act is broad. It directs the Court of Claims to investigate and, if it finds that the United States unlawfully failed to convey certain swamp lands to the plaintiff, to render judgment for the acquisition costs thereof. The identification of the lands is a necessary incident to determining the acquisition costs of such lands. Evidently it was the intention of the Congress that the whole matter should be brought to a conclusion.

Under Rule 39 (a) an interlocutory order is hereby entered, reserving the determination of the amount of the recovery and the amount of offsets, if any, for further proceedings.

MADDEN, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD COMPANY v. THE UNITED STATES

[No. 43654. Decided December 1, 1941. Plaintiff's motion for new trial overruled March 2, 1942]

On the Proofs

Interest on allowed claim; payment withheld by Comptroller General as off-set to amount alleged to be due to Government.—Where amounts allowed by legal authority and admittedly due to plaintiff for transportation services rendered by plaintiff to the Government were withheld by the Comptroller General to apply against an alleged indebtedness of the plaintiff to the United

States under an order of the Interstate Commerce Commission in connection with a proceeding before the Commission involving the determination of excess income of plaintiff for the calendar years 1922 and 1923 under section 15a, par. 6 of the Transportation Act of February 28, 1920; and where plaintiff denied any indebtedness to the United States in respect to the said determination of the Commission and did not consent to said off-set by the Comptroller General; and where no judgment was ever rendered with regard to the amount so determined; it is *held* that the plaintiff under the facts disclosed by the record, is not entitled to recover any interest under the act of March 3, 1875, either before or after said act was amended by the Act of March 3, 1933.

Same; Emergency Railroad Transportation Act of 1933.—The decision by Congress in the enactment of the "Emergency Railroad Transportation Act" of June 16, 1933, to amend section 15a of the Interstate Commerce Act of 1920, and to repeal sub-section (6) of said section, and to direct that all moneys recoverable and payable to the Interstate Commerce Commission under said section 15a should cease to be so recoverable and payable and that all proceedings pending for the recovery of such moneys should be terminated, was not a judgment against the United States within the meaning of the Act of March 3, 1875, that plaintiff was not, up to that time, indebted to the United States under section 15a (6) of the Act of 1920.

Same; interest claimed against sovereign.—The common law rule that delay or default in payment (upon which, in the absence of an express agreement, the right to recover interest rests) cannot be attributed to the sovereign has been adopted by the Congress.

Same.—Interest is not to be awarded against a sovereign government unless its consent has been manifested by an act of its legislature or by a lawful contract of its executive officers.

Same.—The right to claim and recover interest from the United States is purely a matter of grace and all the stipulated conditions upon which the United States has agreed to pay the interest, or to become liable therefor, must be strictly met.

Same; effect of decision of Court of Appeals in prior suit.—In the suit instituted against the Comptroller General by the plaintiff for an injunction restraining the Comptroller General from withholding the moneys due to plaintiff and from applying said moneys to payment of amounts alleged to be due by the plaintiff to the Interstate Commerce Commission under the order of said Commission, while the decision of the Court of Appeals of the District of Columbia was in effect favorable to the plaintiff, the question whether plaintiff was indebted to the United States, as claimed, was not considered or decided by the court, and no judgment was rendered.

The Reporter's statement of the case:

Mr. Carl H. Richmond for the plaintiff. *Mr. E. Randolph Williams* was on the brief.

Mr. John B. Miller, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

Plaintiff seeks to recover $49,449.31 under the Act of March 3, 1875, U. S. Code Supp., Title 31, section 227, as amended by the Act of March 3, 1933, representing interest at 6 per centum per annum on amounts allowed by legal authority and due plaintiff for transportation services performed for the Government, including transportation of mail, passengers, and freight, which sums so accrued and so allowed were withheld by the Comptroller General on and after August 4, 1931, and prior to March 3, 1933, to apply against an alleged indebtedness of $696,705.68 of the plaintiff to the United States under an order of the Interstate Commerce Commission, 170 I. C. C. 451, in connection with a proceeding before the Commission involving the determination of excess income of plaintiff for the calendar years 1922 and 1923 under section 15a, par. 6, of the Transportation Act of February 28, 1920, 41 Stat. 488.

In the alternative, plaintiff seeks to recover $35,821.78, representing interest at 6 percent from the dates of withholding of the amounts due plaintiff, as aforesaid, until March 3, 1933, on which date Congress amended the Act of March 3, 1875, so as to condition the payment of interest only upon the withholding of payment of the final judgment recovered against the United States rather than, as provided in the original act, upon the withholding of any judgment against the United States, or other claim duly allowed by legal authority.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. The plaintiff at all times with which this proceeding is concerned was a Virginia corporation operating as a railroad common carrier in interstate commerce.

All exhibits in this case are part of the stipulation filed therein, and where referred to herein are made a part hereof by reference.

2. The principal issue in this case is plaintiff's right to interest on moneys due it for services rendered to the Post Office and other Government Departments which were withheld by the Comptroller General to offset excess income of plaintiff for the years 1922 and 1923, which excess income the Interstate Commerce Commission sought to recover in 1931 and the plaintiff refused to pay, as hereinafter set out. This issue involves interpretation of the Act of March 3, 1875 (31 U. S. C. 227), both before and after it was amended by the Act of March 3, 1933 (47 Stat. 1489, 1516).

3. April 7, 1931, over plaintiff's motion to vacate on the ground that the term of the Commission's jurisdiction under section 15a (6), Act of February 28, 1920 (U. S. C. A., Title 49, section 15 (a)), had expired, the Interstate Commerce Commission in proceedings on the excess income of plaintiff, the report of which proceedings appears in 170 I. C. C. 451 and also in Exhibit A, made its determination and order under section 15a (6) of the Act of February 28, 1920 (41 Stat. 488), a pertinent paragraph of which reads as follows:

> *It is ordered*, That the amounts of excess net railway operating income which are held by the said Richmond, Fredericksburg and Potomac Railroad Company as trustee for the United States, under the aforesaid provisions, after payment of $169,343.37 on account of the year 1922 and $25,647.79 on account of the year 1923 already made in partial liquidation of its obligations hereunder, together with interest thereon at the annual rate of 6 percent from the date hereof, be paid to this commission in Federal Reserve funds, drawn to the order of the Interstate Commerce Commission and transmitted to the secretary of the commission at Washington, D. C., within ninety (90) days from the date hereof, which amounts are as stated below:
>
> For the period Jan. 1 to Dec. 31, 1922, inclusive...... $222,319.35
> For the period Jan. 1 to Dec. 31, 1923, inclusive...... 474,386.33

The amounts sought to be recovered for the years 1922 and 1923 total $696,705.68.

4. The plaintiff did not pay to the Interstate Commerce Commission the sum of $696,705.68, with interest, within ninety days as it was directed to do by the order of April 7, 1931, referred to in the preceding finding. On July 23, 1931, the Chairman of the Interstate Commerce Commission transmitted a letter (Exhibit B) to the Comptroller General of the United States, in which, after discussing procedure to recover the excess income from plaintiff, he continued as follows:

> In view of these circumstances, the Commission has directed me to call to your attention the fact of the issuance of the order and that the same remains unchallenged by the carrier in any direct proceeding, in order that you may take under advisement the desirability and the propriety of off-setting against the carrier's indebtedness to the United States under this order any sums which may be payable to the carrier for services performed by it for the United States.
>
> * * * * *
>
> The Commission before taking any further proceedings in the matter will await advice from you as to the course which you deem it proper for your office to take. In view of the desirability that the Commission determine its course without undue delay, it will be appreciated if your office will expedite the consideration of its course of action, so far as is practicable.

5. August 4, 1931, the Comptroller General transmitted a letter (Exhibit C) to the Interstate Commerce Commission, a pertinent paragraph of which reads as follows:

> In order to protect amounts otherwise due from railroad companies to the United States this office frequently has resorted to the means of withholding from payment to such carriers earnings from mail, passenger and freight transportation, otherwise due in such cases, in cases where the interests of the Government were not fully protected or the carriers had failed to liquidate their indebtedness when called upon to do so, and no reason appears why, in the present matter, the same procedure may not be adopted, it appearing that the amounts stated in your letter have been certified by your Commission as due the United States under section 15a of the Interstate Commerce Act, as amended, and that the carrier has failed to comply with the order of your Commission.

On the same day (August 4, 1931) the Comptroller General transmitted a letter (Exhibit D) to the plaintiff, the last paragraph of which reads as follows:

> In view of the apparent failure of the carrier to liquidate its indebtedness as found due the United States by order of the Interstate Commerce Commission, I have to advise that all earnings of the Richmond, Fredericksburg and Potomac Railroad Company for transportation services performed for the Government, including mail, passenger and freight transportation, hereafter accruing, will be withheld by this office for application against the indebtedness until a sufficient amount for the purposes has accumulated or until other satisfactory arrangements are made to take care of the indebtedness.

6. August 7, 1931, the plaintiff replied to the letter from the Comptroller General, referred to in finding 5, protesting the action of the Comptroller General. Plaintiff's letter (Exhibit E) reads in part as follows:

> We respectfully protest against your action in this matter and insist upon our right to receive the moneys, the amounts of which are not in dispute, due us for services rendered to the Post Office or other Departments.
>
> * * * * *
>
> * * * The alleged indebtedness of the Railroad not having been judicially ascertained or legally defined or fixed and being denied in toto by the Railroad, cannot, we submit, lawfully be set up by you against moneys admittedly due the Railroad Company for services performed. To thus withhold the payment of moneys admittedly due us would in effect be an attempt to force payment of a claim as to the validity of which the Commission knows we are awaiting the orderly processes of the courts and thus to deprive us of the legal protection to which we are entitled.

7. On August 4, 1931, there had been presented to the Comptroller General for payment, and thereafter from time to time prior to March 3, 1933, there were so presented, claims for transportation services rendered by plaintiff to defendant which had been duly considered and allowed by legal authority and approved for payment by the adminis-

trative departments and agencies concerned, and the Comptroller General withheld payment of the allowed and approved claims for application against the amount claimed by the Interstate Commerce Commission in its order of April 7, 1931 (Exhibit A), until sufficient funds should accumulate to pay the said amount, except interest. The total of the amounts due plaintiff, and upon which interest is claimed, was withheld by the Comptroller General under the Act of March 3, 1875 (18 Stat. 481), before it was amended by the Act of March 3, 1933 (U. S. C. Supp., Title 31, sec. 227). Interest at 6 percent per annum on the total amount so withheld from the dates of withholding until March 3, 1933, is $35,821.78 and interest computed at such rate on such amount from March 3, 1933, to the date, or dates, of payment is $13,627.53.

8. November 11, 1931, the plaintiff commenced an action against the Comptroller General in the Supreme Court of the District of Columbia entitled *Richmond, Fredericksburg & Potomac Railroad Company* v. *McCarl*, praying *inter alia* that the Comptroller General be enjoined from such withholding. The suit was dismissed February 23, 1932, on motion of defendant, and plaintiff appealed therefrom to the Court of Appeals for the District of Columbia, which court on November 21, 1932, rendered its decision reported in 62 Fed. (2d) 203, holding in part that no injunction should issue pending determination of the action commenced on July 5, 1932, referred to in finding 9.

9. July 5, 1932 (prior to the decision of November 21, 1932, referred to in finding 8), the United States commenced an action against plaintiff in the Supreme Court of the District of Columbia. The Interstate Commerce Commission intervened therein as a party plaintiff. In this case the United States sought to enforce and reduce to final judgment the order of the Interstate Commerce Commission of April 7, 1931, referred to in finding 3, and to recover $696,705.68 and interest which the Interstate Commerce Commission had ordered paid. By sections 205 and 206 of the Act of June 16, 1933, 48 Stat. 211, 220, Congress amended Section 15a, Title 49, U. S. C., repealed paragraph (6) thereof, and enacted Section 15b. Subsection (a) of Section 206 provides as follows:

(a) All moneys which were recoverable by and payable to the Interstate Commerce Commission, under paragraph (6) of section 15a of the Interstate Commerce Act, as in force prior to the enactment of this title, shall cease to be so recoverable and payable; and all proceedings pending for the recovery of any such moneys shall be terminated. The general railroad contingent fund established under such section shall be liquidated and the Secretary of the Treasury shall distribute the moneys in such fund among the carriers which have made payments under such section, so that each such carrier shall receive an amount bearing the same ratio to the total amount in such fund that the total of amounts paid under such section by such carrier bears to the total of amounts paid under such section by all carriers; except that if the total amount in such fund exceeds the total of amounts paid under such section by all carriers such excess shall be distributed among such carriers upon the basis of the average rate of earnings (as determined by the Secretary of the Treasury) on the investment of the moneys in such fund and differences in dates of payments by such carriers.

10. After the repeal of paragraph (6) of section 15a of the Act of February 28, 1920, and the enactment of section 206 (a), Act of June 16, 1933, and while the action in the Supreme Court of the District of Columbia, referred to in finding 9, was still pending, the plaintiff herein and the defendant in said action on June 27, 1933, filed a motion (which motion was consented to by both the United States and the Interstate Commerce Commission) to dismiss the suit, as follows:

Whereas Section 205 of the Emergency Railroad Transportation Act, 1933, approved June 16, 1933 (Public No. 68, 73rd Congress), has amended Section 15a of the Interstate Commerce Act by repealing the provisions of said section upon which the above-entitled cause is based;

Whereas Section 206 (a) of the Emergency Railroad Transportation Act, 1933, provides in part as follows:

"All moneys which were recoverable by and payable to the Interstate Commerce Commission, under paragraph (6) of section 15a of the Interstate Commerce Act, as in force prior to the enactment of this title, shall cease to be so recoverable and payable; and all proceedings pending for the recovery of any such moneys shall be terminated."

> And whereas the above-entitled cause is a proceeding, *inter alia*, for the recovery of moneys payable to the Interstate Commerce Commission under paragraph (6) of Section 15a of the Interstate Commerce Act, as in force prior to the enactment of the Emergency Railroad Transportation Act, 1933;
>
> Now comes the defendant and moves the court to dismiss the above-entitled cause, without costs to any party.

On the same day, to wit, June 27, 1933, the Supreme Court of the District of Columbia entered an order (Exhibit Q) dismissing the suit.

11. There has been no judgment against the United States within the meaning of the Act of March 3, 1875 (18 Stat. 481), or that Act as amended by the Act of March 3, 1933 (U. S. C. Supp., Title 31, sec. 227), holding that plaintiff was not indebted to the United States in whole or in part for the amount of $696,705.68 under the provisions of section 15a (6) of the Act of February 28, 1920 (41 Stat. 488), on and prior to June 16, 1933. The United States does not consent or agree that plaintiff was not so indebted on and prior to that date. The amount which had been withheld was paid to plaintiff as promptly as practicable after June 16, 1933.

12. June 19, 1933, plaintiff wrote a letter (Exhibit R) to the Comptroller General, a pertinent paragraph of which reads as follows:

> I understand from your office that appropriations are now available with which to pay the principal amount due the Railroad Company, but not the interest thereon, and am further advised that you are not prepared at this time to concede the right of the Railroad Company to such interest. In view of this situation and of the immediate financial needs of the Railroad Company I beg to ask that you promptly release to the Railroad Company the principal amount of money due it, leaving for future consideration and determination the matter of interest, the Railroad Company in the meantime protesting its right to interest and saving and reserving unto itself all manner of remedy to hereafter recover same.

June 26, 1933, the Comptroller General wrote a letter (Exhibit S) to plaintiff, two paragraphs of which read as follows:

> In reply I have today given instructions for the release of said earnings and the bills will be settled in

due course as promptly as the work of this office may permit.

With respect to the statement in your letter that the company wishes to reserve its right to claim interest upon the amounts withheld over the period of such withholding, it may be stated that no interest accrues upon amounts which have been withheld by this office on account of indebtedness to the United States, there being no law allowing the payment of such interest. * * *

13. Between June 27 and July 14, 1933, the Comptroller General paid to plaintiff the principal amounts of its earnings previously withheld by him as hereinbefore stated, but did not pay any interest thereon.

14. If plaintiff is entitled to interest on the amounts withheld at the rate of 6 percent per annum, the interest at such rate until March 3, 1933, totals $35,821.78, and such interest to the dates of payment on the amounts withheld totals $49,449.31.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

If plaintiff is entitled to recover interest on the amounts due it and allowed by legal authority and withheld by the Comptroller General, the amount due it is $35,821.78. *Whitbeck, Receiver of L–W–F Engineering Co., Inc.*, v. *United States*, 77 C. Cls. 309; *Chicago, Indianapolis & Louisville Railway Co. a Corporation*, v. *United States*, 78 C. Cls. 96. (Certiorari denied, 290 U. S. 671, in each case.) Plaintiff contends, however, that these decisions did not correctly interpret and apply the Act of March 3, 1875, after it was amended March 3, 1933, and insists that the act as it stood before the amendment continued after amendment to require the payment of interest at 6 percent until payment of any sum allowed by legal authority and withheld prior to the amendment and continued to be withheld thereafter. The amount of such interest subsequent to March 3, 1933, on amounts due plaintiff and allowed by legal authority prior thereto (during the period such amounts were withheld after March 3, 1933), is $13,627.53.

On the other hand counsel for defendant renews the contention long ago made and denied by this court, that the original Act of March 3, 1875, prior to the amendment thereof on March 3, 1933, did not authorize the allowance and payment of interest on any sum due to a claimant from the United States, unless and until that claim had been reduced to judgment and thereafter withheld. The defendant next renews the contention made and denied in *Whitbeck* v. *United States*, *supra*, and *Chicago, I. & L. Ry. Co.* v. *United States*, *supra*, that the Act of March 3, 1933, amending the Act of March 3, 1875, extinguished all claims and right to interest on amounts due the claimant and allowed by legal authority and withheld prior to March 3, 1933, as offsets against claims of the Government against the claimant. Finally, the defendant says that if plaintiff is entitled to recover any interest under the Act of 1875 no interest was payable or recoverable after March 3, 1933, on amounts theretofore allowed and withheld.

In the circumstances of this case, we do not find it necessary to re-examine the first contention made by plaintiff or the first and second contentions made by the defendant for the reason that we are of opinion that plaintiff is not entitled under the facts disclosed by the record to recover any interest under the Act of March 3, 1875, either before or after that act was amended on March 3, 1933. Plaintiff denied any indebtedness to the United States in respect of the computation and determination made by the Interstate Commerce Commission under section 15a (6) of the Transportation Act of 1920 and did not consent to the set-off by the Comptroller General of amounts otherwise due and determined to be due plaintiff by the United States. The last portion of the Act of March 3, 1875 (18 Stat. 481), as amended, pertinent to this phase of plaintiff's claim (the words in brackets were in the original act but were excluded in the amendment of March 3, 1933) provided as follows:

> But if such plaintiff [or claimant] denies his indebtedness to the United States, or refuses to consent to the set-off, then the Comptroller General of the United States shall withhold payment of such further amount of such judgment [or claim], as in his opinion will be sufficient

> to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it shall be the duty of the Comptroller General of the United States to cause legal proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch. And if in such action judgment shall be rendered against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld as before provided, the balance shall then be paid over to such plaintiff by such Comptroller General of the United States with 6 per centum interest thereon for the time it has been withheld from the plaintiff.

The facts show without dispute that no judgment was ever rendered with reference to whether or not the amount of $696,705.68 determined by the Interstate Commerce Commission (170 I. C. C. 451) was due by plaintiff to the United States. Suit had been instituted by the United States against plaintiff in the Supreme Court of the District of Columbia to recover this amount but no hearing thereon was had up to the time that Congress, on June 16, 1933, amended section 15a of the Act of February 28, 1920, and repealed section 6 thereof, and enacted section 206 (a) as follows:

> All moneys which were recoverable by and payable to the Interstate Commerce Commission, under paragraph (6) of section 15a of this chapter, as in force prior to June 16, 1933, shall cease to be so recoverable and payable; and all proceedings pending for the recovery of any such moneys shall be terminated. The general railroad contingent fund established under such section shall be liquidated and the Secretary of the Treasury shall distribute the moneys in such fund among the carriers which have made payments under such section, so that each such carrier shall receive an amount bearing the same ratio to the total amount in such fund that the total of amounts paid under such section by such carrier bears to the total of amounts paid under such section by all carriers; except that if the total amount in such fund exceeds the total of amounts paid under such section by all carriers such excess shall be distributed among such carriers upon the basis of the average rate of earnings (as determined by the Secretary of the Treasury) on the investment of the moneys in such fund and differences in dates of payments by such carriers.

The provisions of paragraph 6 of section 15a of the Interstate Commerce Act of February 28, 1920, 41 Stat. 488, were as follows:

> If, under the provisions of this section, any carrier receives for any year a net railway operating income in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof shall, within the first four months following the close of the period for which such computation is made, be recoverable by and paid to the Commission for the purpose of establishing and maintaining a general railroad contingent fund as hereinafter described. For the purposes of this paragraph the value of the railway property and the net railway operating income of a group of carriers, which the Commission finds are under common control and management and are operated as a single system, shall be computed for the system as a whole irrespective of the separate ownership and accounting returns of the various parts of such system. In the case of any carrier which has accepted the provisions of section 209 of this amendatory Act the provisions of this paragraph shall not be applicable to the income for any period prior to September 1, 1920. The value of such railway property shall be determined by the Commission in the manner provided in paragraph (4).

The quoted provisions of section 206 (a) and other changes made in section 15a of the Act of 1920 by the Emergency Railroad Transportation Act of 1933, 48 Stat. 211, are discussed and explained in Report No. 193, 73d Congress, 1st Session, of the Committee on Interstate and Foreign Commerce of the House of Representatives, at pp. 27–30. The Committee said in part, p. 28,

> By this bill it is proposed to strike out the whole of section 15a and substitute therefor what may be termed a rule of rate making, indicating certain factors which, among others, the Commission, in the exercise of its power to prescribe just and reasonable rates, must take into consideration.
>
> The bill provides (sec. 206) for the return to carriers of amounts which they have heretofore paid to the Commission under the provisions of section 15a. Such

amounts, placed in the railroad contingent fund, have been invested in obligations of the United States, in accordance with the provisions of section 15a. It is expected that, upon liquidation of the fund, amounts earned will bring the fund up to a point where it is in excess of the total amounts paid in by carriers, and the provisions of section 206 of the bill are so written as to provide for distribution among the carriers of the earnings of the fund, making allowance for the differences in periods of time that payments of different carriers have been in the fund.

And further, at p. 29:

> This section 15a is a unique provision in the public regulation of railroads and utilities in this country. When the Transportation Act was drawn in 1920 this proposal did not come from the Interstate Commerce Commission, nor from the railroads, nor from the shippers, but appears to have originated with some group which was apparently dominated by a single individual who was interested in trying to stabilize the price for railroad securities. The Committee on Interstate and Foreign Commerce in 1919 condemned such a provision as 15a. * * *
>
> The experience of the past 12 years bears out the correctness of the position taken by the committee in 1919. The rule has been disappointing to the security owners who thought they would profit from it. The shippers have never favored it, and the Interstate Commerce Commission has consistently and earnestly recommended its repeal.

See also Report No. 87, 73d Congress, 1st Session, of the Committee on Interstate Commerce of the Senate, May 15, 1933, pp. 11 and 12.

From the foregoing it is clear that there has never been a determination by judgment or otherwise that plaintiff was not in fact or in law indebted to the United States in whole or in part for the amount of $696,705.68 under section 15a (6) of the Interstate Commerce Act of 1920, supra. The decision by Congress in the Emergency Railroad Transportation Act of June 16, 1933, to amend section 15a, and repeal subsection (6) thereof, and direct that all moneys which were recoverable by and payable to the Interstate Commerce Commission under paragraph (6) of the original

section 15a as in force prior to June 16, 1933, should cease to be so recoverable and payable, and that all proceedings pending for the recovery of any such moneys should be terminated, was not a judgment against the United States within the meaning of the Act of March 3, 1875, that plaintiff was not, up to that time, indebted to the United States under section 15a (6) of the Act of 1920.

The termination of the right to collect amounts due under the prior statute of 1920 in all proceedings for that purpose pending was a matter of policy. Had paragraph (6) of section 15a been simply repealed, plaintiff's liability thereunder prior to the repeal would not have been affected in view of the provisions of section 13 of the Revised Statutes, U. S. Code, Title I, section 29, that the repeal of any statute shall not have the effect to release or extinguish any liability incurred under such act unless the repealing act shall so expressly provide, and that such statute shall be treated as still remaining in force for the purpose of sustaining any proper action for the enforcement of such liability. The language of section 206 (a) of the Act of June 16, 1933, shows that in its enactment Congress was proceeding on the theory that unpaid amounts which had theretofore been determined by the Interstate Commerce Commission under the 1920 Act were due or recoverable in whole or in part, rather than that no indebtedness to the United States existed in respect thereof.

After enactment of sections 205 and 206 of the Emergency Railroad Transportation Act of June 16, 1933, the Government on June 27 filed a motion in the pending suit against plaintiff to dismiss the suit under section 206 (a) of the 1933 Act. The motion was allowed and the suit was dismissed by the court on the same day.

Inasmuch as there does not exist in this suit one of the conditions upon which the United States consented to pay interest or to become liable therefor on amounts withheld under the Act of March 3, 1875, to wit, a judgment against the United States in respect of the claimed indebtedness due the United States or its equivalent, an admission that the plaintiff was not indebted to the United States during the

period of withholding, no interest is payable or recoverable by plaintiff under the Act of 1875.

The common-law rule that delay or default in payment, (upon which, in the absence of an express agreement, the right to recover interest rests), cannot be attributed to the sovereign has been adopted by the Congress. *United States* v. *North American Transportation & Trading Company*, 253 U. S. 330. Interest is not to be awarded against a sovereign government unless its consent has been manifested by an act of its legislature or by a lawful contract of its executive officers. *United States* v. *North Carolina*, 136 U. S. 210. The right to claim and recover interest from the United States is purely a matter of grace and all the stipulated conditions upon which the United States has agreed to pay the interest, or become liable therefor, must be strictly met. *Tillson* v. *United States*, 100 U. S. 43, 47; *Harvey* v. *United States*, 113 U. S. 243; *U. S. ex rel Angarica* v. *Bayard*, 127 U. S. 251; *Cherokee Nation* v. *United States*, 270 U. S. 476; section 177, Judicial Code, U. S. Code Title 28, section 284. *Hind* v. *United States*, 70 C. Cls. 288, 293.

The fact that plaintiff denied liability for the whole or any part of the amount determined by the Interstate Commerce Commission to be due and protested the withholding by the Comptroller General of amounts otherwise admittedly due plaintiff and the applying of same as an offset against the alleged indebtedness to the Government is not alone sufficient to entitle plaintiff to interest under the Act of 1875. Nor is it of any controlling importance that plaintiff instituted a suit against the Comptroller General for a permanent injunction restraining him from withholding certain moneys due the plaintiff and applying same to the payment of an amount alleged to be due by plaintiff to the Interstate Commerce Commission, and obtained a favorable decision in such suit in the Court of Appeals for the District of Columbia November 21, 1932 (62 Fed. (2nd) 203). The question whether plaintiff was indebted to the United States, as claimed, was not considered or decided by the court. At the time the appeal was taken the United States had not instituted suit against plaintiff to recover the alleged indebted-

ness. The court held in substance that the determination of the Interstate Commerce Commission that plaintiff was indebted to the United States was administrative and not judicial; that neither in the act under which the determination was made, nor in any section thereof, was the Commission empowered to make a finding of this nature conclusive against the carrier; that it was without the power of a court to enter a judgment; that "The legal effect of the order therefore is no more than a bookkeeping ascertainment by the Commission of an indebtedness due by the carrier. To give it finality it was necessary it should be reduced to judgment." The court further said:

> Here, as we have seen, the services appellant rendered the United States are admitted. The amount due therefor is not contested, and so we have a case in which the United States owe appellant money which the Comptroller General refuses to pay because of an unsettled and unliquidated claim of the United States against appellant. This may not be done. There is, however, a statute of the United States which provides a right and a remedy. It authorizes the United States to withhold payment in any case in which an allowed claim is presented to the Treasury for payment (and appellant's is such a claim) where the United States has a counterclaim, until suit can be instituted on the counterclaim and pressed to final judgment. Act Mch. 3, 1875, c. 149, 18 Stat. 481; Tit. 31 U. S. C. A., sec. 227. This statute, we think, was the chart which should have guided the Comptroller General in the procedure to be taken in this case, for otherwise we should have to concede to that officer the power of determining and settling an indebtedness of a citizen of the United States without trial, the examination of witnesses, or the other safeguards of judge and jury which in our system of government are guaranteed. Had the United States in the first instance availed themselves of the right and remedy provided by the statute, the delay of a year which has resulted would have been avoided, and the rights of the parties as between themselves would likely have been settled without further recourse to the courts.

Following this the court referred to the contention of the Comptroller General that there was no obligation on the United States to press the order of the Commission to judgment but a duty on the railroad, if dissatisfied with the order

of the Interstate Commerce Commission, to resort to a three-judge court in an effort to have it set aside, or to the Court of Claims to recover judgment against the United States for the withheld amount of indebtedness of the United States to the Railroad Company. The court said:

> We are not impressed with this position in either respect. That resort by appellant to a three-judge court was open to it to question an order solely to pay money, even if conceded, which is going a long way, is not conclusive, for, the order of the commission not being self-executing, appellant was under no legal obligation to have it reviewed until it was sought to enforce it, and this we think required something more than the order itself. Appellant was asking nothing more than the payment of an admitted debt. Appellee sought to avoid payment on the ground of indebtedness to the United States. The duty of establishing the counterclaim and the legality of the set-off was therefore, in the circumstances, an obligation not of appellant but of the United States.

In conclusion the court held that at the original hearing in the trial court that court should have required the Comptroller General to elect whether he would institute suit to reduce the determination of the Interstate Commerce Commission to judgment, as required by the Act of 1875, or suffer the injunction to issue, and, in this connection, the court said:

> The purpose of the suit was not to challenge the discretion of the Comptroller General but rather to challenge his authority to withhold a sum of money admitted to be due and payable. In such a case it is not necessary to join the United States. But as we have already seen, since the appeal was taken, the United States and the commission, as parties plaintiff, have instituted a suit to make effective the order of the commission finding the appellant chargeable with excess earnings and to secure judgment for the amount thereof. In these circumstances, we think we should have regard to the condition as we find it now, and that no injunction should issue pending the determination of the proceeding, which as we have seen, has now been duly begun under the provisions of the statute.

In the circumstances the Court of Appeals affirmed the decision of the lower court denying the injunction with directions that if it should be found that the Comptroller General

had withheld moneys otherwise due the railroad in excess of the claimed indebtedness to the United States, such excess should be ordered paid to plaintiff at once.

Before the suit by the United States against plaintiff was heard and decided by the District Court, the case was dismissed on motion of the plaintiff and the defendant, as hereinbefore stated, without any consideration of or decision by the court as to whether under section 15a (6) of the Act of February 28, 1920, *supra*, plaintiff was or was not indebted to the United States prior to June 16, 1933.

In these circumstances and for the reasons hereinbefore stated, the petition must be dismissed and it is so ordered.

MADDEN, *Judge;* JONES, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

THE REED PROPELLER CO., INC., v. THE UNITED STATES

[No. 42133. Decided January 5, 1942]

On the Proofs

Patents for airplane propeller; validity; infringement; descriptions indefinite and ambiguous.—Where the alleged discovery or principle which the inventor attempts to teach the public by means of the specification in the application for patent #1,463,556 is dependency upon the contributing effect of centrifugal force to a degree or extent previously not contemplated by the airplane propeller designer; it is *held* that this degree is defined by statements in said specification that are vague and indefinite.

Same.—Under the patent statutes, one skilled in the art is entitled to a disclosure sufficiently clear in the specifications as to enable him to know what might be safely used or manufactured without practicing the invention or discovery, and which might not, and to arrive at this knowledge without the necessity of experimentation.

Same.—Where in the claims to monopoly with relation to patent #1,463,556, the only distinction which the claims attempt to make with respect to the prior art is one of proportion, as

indicated by use of the phrase "partly but mainly;" and where the patent monopoly is not expressed in concise and exact terms in accordance with the statutes; it is *held* that the claims thereunder are ambiguous and the patent accordingly does not fulfill the requirement of the patent statutes and is therefore void.

Same.—It is *held* that upon the specifications and data produced relative to the Government propeller charged as infringing patent #1,463,556, the claims 1, 2, 3, 4, and 13 in issue, even if they were not invalid, are not infringed by the Government structure.

Same.—It is *held* that claims 1, 5, 15, and 16, patent #1,518,140, insofar as said claims specify the degree or extent to which centrifugal force is employed, fail to define a patent monopoly and said claims are not infringed by the Government structure and are invalid.

Same.—It is *held* that claim 14, patent #1,518,140, directed to a metal aeronautical propeller with blades increasing in cross-section from the tip toward the hub, is indefinite with respect to patent monopoly, and is invalid, and not infringed by the Government structure.

Same.—It is *held* that claims 11, 12, and 13, patent #1,518,140, being directed to the material or composition of a propeller blade, and relating to the use of duralumin therein, express no patentable invention and are therefore invalid.

The Reporter's statement of the case:

Mr. Charles H. Walker for the plaintiff. *Messrs. Stephen H. Philbin* and *Alexander C. Neave* were on the briefs.

Mr. Clifton V. Edwards, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. J. F. Mothershead* was on the brief.

The court made special findings of fact as follows:

1. This is a patent suit alleging infringement of two United States Letters Patents to Sylvanus A. Reed, as follows:

No. 1,463,556, filed May 26, 1920; issued July 31, 1923.
No. 1,518,410, filed June 22, 1922; issued Dec. 9, 1924.

These patents will be hereinafter referred to as the first patent in suit, and the second patent in suit, respectively.

The first patent in suit is directed to an aeronautical propeller having single-piece blades thinner than previously

customary and dependent upon the stiffening effect of centrifugal force to make the propeller practically operative.

The second patent in suit is directed to blades of the type designated in the first patent in suit and to the use of certain metals or alloys for aeronautical propeller blades.

Copies of the two patents in suit, plaintiff's exhibits Nos. 1 and 3, respectively, and copies of the Patent Office File Wrappers and contents thereof, of the two applications which matured into the two patents in suit, defendant's exhibits Nos. 160 and 161, respectively, are by reference made a part of this finding.

2. The plaintiff was incorporated under the laws of the State of New York on January 8, 1924, by Reed and others. The first patent in suit was issued to the inventor and was assigned by him to the plaintiff on January 15, 1924. The second patent in suit was issued directly to the plaintiff.

3. At the date of the filing of the petition in this suit, December 23, 1932, the plaintiff was, and had been for at least six years, the sole and exclusive owner of the entire right, title, and interest in and to the patents in suit and all rights of recovery thereunder.

4. Notice of infringement was given by plaintiff to defendant in a letter dated January 23, 1931, addressed to the Secretary of War, receipt of which was acknowledged February 3, 1931, and in a letter dated May 21, 1931, addressed to the Secretary of the Navy, acknowledged July 2, 1931.

5. The two Reed patents in suit have been involved in previous litigation but have never been adjudicated.

Included in such previous litigation was an earlier suit on Reed patent No. 1,463,556 filed May 5, 1924, by plaintiff against the Standard Steel Propeller Company in the United States District Court for the Western District of Pennsylvania. This suit was dismissed under date of January 22, 1929, defendant having entered into a license agreement with the plaintiff under date of November 3, 1928.

On January 26, 1925, a suit on the same two patents here in suit was filed in the Court of Claims by plaintiff against the United States, this suit being based on certain propellers which the Government had purchased from the Standard Steel Propeller Company.

This suit was dismissed on motion of plaintiff without prejudice on January 19, 1929.

The testimony of the patentee, Sylvanus A. Reed, in the former suit in the Court of Claims, No. E–544, is in evidence in the present case as defendant's exhibit No. 178, and the testimony of defendant's witness, Frank W. Caldwell, and the exhibits referred to therein, were transferred to the present case by Order of this Court dated September 18, 1934. These exhibits are made a part hereof by reference.

6. In addition to the license agreement above referred to, the Curtiss Aeroplane & Motor Company, Incorporated, is also licensed under the patent in suit. Its license was first acquired April 26, 1923, directly from Reed and later amended June 17, 1924, and April 1, 1929. The Curtiss Company acquired the capital stock of the plaintiff company by purchase from Reed and his associates for the sum of $475,000.00.

OPERATION OF AN AERONAUTICAL PROPELLER

7. An aeronautical propeller is a device consisting of two or more blades attached to or made integral with a hub, the blades being set at an angle so that when rotative effort, termed "torque," is applied to the hub by means of an engine the rotation of the angularly positioned blades exerts a thrust and pulls or drives the aeroplane through the air. The propeller is therefore in effect a transformer of torque into thrust and the degree to which the rotational power is transformed into translational power is a measure of the efficiency of the propeller.

As the propeller rotates, its forward movement as a whole is along its rotational axis and the blade sections therefore travel in a helical path. The theoretical forward advance of the propeller for one complete revolution, is termed the "pitch."

The thrust efficiency of an inclined surface moving through the air is dependent both upon the inclination of the surface and its speed of movement. As the outer portions of a propeller blade have a greater radius and move faster than those portions near the hub, the usual propeller

has its blades designed so that the pitch angles of the blades are greater at the hub than they are at the tip portion. A propeller blade thus designed with varying pitch angles is a twisted blade and is termed a helical blade as distinguished from a flat blade which has an equal pitch angle from its hub to its tip.

The outer two-thirds of the blade is that portion usually depended upon to do the most work.

Efficiency is also dependent upon the shape of the cross section of the blade, the efficiency of the blade varying at different distances from the hub. Thin cross sections which are termed thin "air foils" are more efficient than thick ones, and this fact has been known since the earliest days of development of aircraft.

It is necessary to have a blade of compromise design in order to retain as many as possible of the advantages of the thin blade, and at the same time have the thickness essential to withstand the various stresses to which it is subjected.

8. The various forces acting upon aeronautical propeller blades may be classified as follows:

1. Bending and Tensile Stresses:

   (a) Air load (findings 9, 10).
   (b) Due to centrifugal force (findings 11, 12, 13).

2. Torsion Stresses:

   (a) Air load (finding 14).
   (b) Due to centrifugal force (findings 15, 16, 17).

9. A propeller in operation during take-off, climb, or level flight, has a forward or positive thrust, the rear surfaces of the blades pushing against the air. These air forces acting upon the rear of the blades tend to bend them forward out of the plane of rotation.

The blades in resisting the bending moment produced by the air forces act as cantilever beams fixed at the hub and free at the tip. The amount of bending will be dependent upon the elasticity of the material used as well as upon the thinness or thickness of the blades.

When the aeroplane is placed in a diving attitude, the air forces then act upon the front surfaces of the blades, causing the propeller to drive the engine in a similar manner to that of an engine of an automobile being driven by the wheels when the automobile goes down a hill. During diving there is a negative thrust with a consequent tendency of the air forces to bend the blades backward.

There is no satisfactory estimate known to those skilled in the art of propeller design as to what the tip deflection of a blade would be in order to impair the aerodynamic efficiency, but it is generally agreed that the aerodynamic efficiency of a propeller is not measurably impaired by the bending of the blade at the tip amounting to 4% of the diameter of the propeller.

10. In addition to the tendency of the air forces to bend the blades out of the plane of rotation, there is also a tendency of the blade to bend in its plane of rotation. This may be expressed as a tendency of the blade tip to lag behind the position which it would otherwise assume in its rotational plane if the blade had no pitch and thus were doing no work upon the air.

11. Each particle of a rotating propeller is urged radially outward from the axis of rotation by the action of centrifugal force. Each cross section is, therefore, subjected to a tensile load equal to the pull of centrifugal force on that portion of the blade lying between the tip and the section in question. Furthermore, since the direction of action of centrifugal force on each portion of the blade is radial, i. e., perpendicular to the axis of rotation, if the center of gravity of the portion of the blade between any cross section and the tip does not lie in the same radial line as the center of gravity of that cross section, then, in addition to the tensile load, centrifugal force will impose a bending moment on the section.

The direction of action of this bending moment is such as to urge the rotating blade toward a position in which the axis of the blade, i. e., the line joining the centers of gravity

of the various cross sections, would lie in a straight radial line perpendicular to the axis of rotation. The plane generated by such a radial line as it rotates is referred to as the plane of rotation.

Another way of stating the action of centrifugal force in producing bending moments in a propeller is that if the axis of a rotating blade is not already located in the plane of rotation, centrifugal force tends to move it there.

In metal propellers such as are herein involved, the pull due to centrifugal force on a blade near the hub is approximately twenty-five tons.

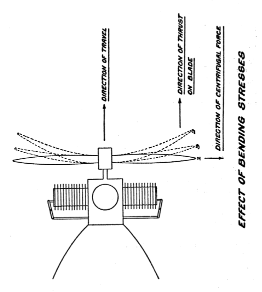
12. The effects of the air load and centrifugal force as described in findings 9 and 11 are graphically represented in exaggerated form in the drawing reproduced in this finding. In this drawing, which shows a radial propeller of the tractor type driven by an internal-combustion engine, the position of the propeller blades when at rest is indicated at 1. If the propeller is contemplated as revolving in normal operation *but without the effect of centrifugal force* (a consideration possible in theory only), the tips of the propeller will be deflected by the air load and consequent thrust into a position designated by the reference character 2.

It is possible to calculate the air load as applied to the rear face of the propeller and to calculate the amount of tip deflection of the same under this theoretical condition, as well as the bending stresses imparted to the blade by such deflection. These bending stresses may be mathematically contemplated as a tensile stress in the rear portions of the blade and a compression stress in the front portions of the blade.

With the propeller in actual flight operation, centrifugal force tends to restore the blades to a radial position and therefore to resist the flexure or bending due to the air load alone. The propeller will therefore assume position 3 intermediate the no-load position 1 and the flexed position 2 due to air load alone.

In position 3 the degree of flexure will be less, and hence the tensile stresses due to air load alone will be less. The

total tensile stress however will be the tensile stress due to centrifugal force added to the tensile stress due to air load with the degree of flexure indicated in intermediate position 3.



13. The centrifugal force is a fairly constant quantity per revolution at any given engine power and propeller speed.

The air load on the propeller blades is fluctuating in character. One cause of such fluctuation is due to interference between the blade and certain portions of the aeroplane behind the blade, such as a wing or landing gear

strut which causes changes in the air load as the blade passes that portion of the aeroplane.

It is possible to calculate the approximate air load at various positions along a propeller blade and then to mount the propeller in a horizontal position and apply the calculated load by means of weights at calculated points on the propeller blade. By means of such procedure termed a static test, it is possible to directly measure the tip deflection of a propeller blade due to the air load, and as indicated by position 2 in the drawing reproduced in finding 12.

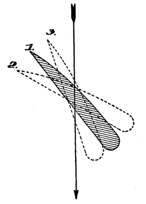
A second form of test known as the whirl test involves the mounting of a propeller either on the shaft of an internal-combustion engine or an electric motor, rotating the same under various speeds and power conditions, and observing or measuring the tip deflection by means of an optical system. Such a test gives the resultant deflection as indicated in position 3 of the above-mentioned drawing and which is due to the combined action of air load and centrifugal force.

14. As a propeller blade rotates, the air load acting on the inclined surfaces of the blade tends in general to *increase* the pitch angle of the blade, or expressed in another way, the blade tends to bite deeper into the air. Such action is shown in the following sketch, "Effect of Torsion Stresses," in which the normal position of a propeller blade is shown in cross section at 1, its direction of rotation being indicated by the vertical arrow. The air load tends to twist the blade about its axis toward a position indicated by the dotted lines at 2.

Such tendency or the degree of torsional stress thus set up at any given cross section is dependent upon a number of factors, such as the pitch angle of the blade, its thickness, its taper, its center of pressure, and its ratio of width to thickness at various sections, and its lineal speed relative to the air at that section.

15. Centrifugal force tends to bring all of the particles of the blade into the same plane and thus tends to *decrease* the pitch angle of the blade. As shown in the sketch, the tendency of centrifugal force is to twist the blade into the position shown in the dotted line section 3.

16. The combined effect of air load and centrifugal force on the torsional stresses set up in the blade is the algebraic sum of these at any given point or cross section. The torsional stresses due to centrifugal force near the hub of the propeller are ten or twelve times that of the torsion due to air load, and the resultant tendency is to reduce the pitch.



EFFECT OF TORSION STRESSES

Near the tip or outer portions of the blade, however, where the sections of the blade are relatively thin and light, the torsion due to air load is greater than the opposite torsional effect due to centrifugal force.

There is in general therefore, and under the action of these combined stresses, a tendency for the blade to increase its pitch near the tip and to decrease its pitch in the central part and for certain sections near the hub.

17. If the tips of the propeller are very thin, the tendency of the blade at the tip portion to increase in pitch angle actually causes a deflection of the same. This increases the

angle of attack and in turn increases the thrust or air load on the tip, which in turn causes a still greater deflection. This deflection, not being exactly parallel to the axis of rotation of the propeller, causes a rise of centrifugal torsion at that point with a consequent decrease of pitch aided by the elasticity of the blade.

There is thus existent a periodical function of an increase of thrust followed by an increase of centrifugal torsion with a consequent cycle of increase and decrease of pitch angle. This phenomenon, which is called "flutter," causes a rapid periodical alternate stressing of the blade in torsion in opposite directions, which causes fatigue in the fibers of the material of which the propeller is made, ultimately resulting in a fracture of the propeller.

Due to the existence of this fluctuating tendency it is of prime importance in propeller design that a blade be of sufficient rigidity to obviate excessive "flutter."

18. The torsional stresses in a propeller blade are highly complicated and involve so many variables that it is an impossibility to make satisfactory calculations of the stresses due to torsion.

Due to the fact that a propeller is driven by an internal-combustion engine, certain vibratory stresses are imparted to the blades by the power impulses of the individual pistons.

The design of an aeronautical propeller which involves any departure from standardized forms of construction involves a whirl test and a flight test, and a design of the blade by empirical methods so as to obtain a blade as thin and light as possible and yet not sufficiently weak because of its thinness to cause dangerous fluctuating torsional and vibratory stresses.

19. The torsional stresses are at right angles to the tensile stresses imposed by the bending effects of centrifugal force and air load, and are therefore not directly additive quantities.

20. Since the early days of the aeronautical propeller art, it has been a fundamental concept that a propeller should be as light in weight and have blades as thin as possible

concomitant with the ability to have ample strength and to resist wear and fracture; and both wooden and metal propellers had been used prior to the origin of the disclosures embodied in the patents in suit.

In 1920 the conventional tip speed for propellers was from 800 to 900 feet per second, it having been found that a propeller is not as efficient if the tip speed approximates or is greater than the velocity of sound, which is 1,100 feet per second.

Propellers from 8 to 9 feet in diameter would require rotative speeds of approximately 1,900 to 2,100 revolutions per minute to give them a tip speed of 900 feet per second.

THE PATENTS IN SUIT

21. The thought or principle expressed in the first patent in suit (patent No. 1,463,556) is that prior art propellers were designed with blades thick and heavy enough to give them sufficient structural rigidity to withstand the operating stresses, but if the stiffening effect of centrifugal force is taken sufficiently into consideration, some of the material previously thought necessary to obtain sufficient structural rigidity may be safely omitted, the resulting thinner blades being more efficient and being capable of operation at higher speeds than the prior art thick blades.

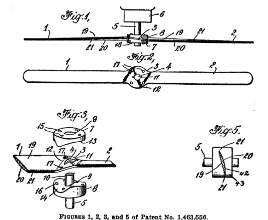
The stiffening effect of centrifugal force is referred to in the specification by the patentee as "dynamic rigidity" or "quasi rigidity" or "virtual rigidity," the word "rigidity" as used having its conventional dictionary meaning of "the quality of resisting change of form."

The terms "structural rigidity" and "intrinsic rigidity," as used in the patent specification, are synonymous and mean the resistance to deformation of the propeller blades by virtue of the physical properties of the material from which they are constructed, its amount and disposition. Such structural rigidity is of the same value whether the blades are rotating or at rest.

22. Figures 1 and 2 of the first patent in suit disclose an aeroplane propeller made of a single piece of material

twisted to give the desired pitch to the blades, the blades diminishing in thickness from the hub out to the tips.

Figures 1, 2, 3, and 5 are reproduced herewith, figure 3 showing the details of the hub mounting, and figure 5 showing a modified form in which separate blades are set or anchored into the hub, the blade being shown in cross section.



FIGURES 1, 2, 3, and 5 of Patent No. 1,463,556.

The patentee states in his specification that:

> My invention relates to propellers for air craft and flying machines and discloses a novel principle for obtaining the necessary rigidity of the propeller blades to resist the stresses, thereby making possible the use of much thinner blades than heretofore with a gain in efficiency.
>
> Heretofore aeronautical propellers have been made of material such as wood or metal constructed to be structurally rigid against operative stresses, such rigidity usually being substantially sufficient, even when at rest, to resist tangential axial and radial stresses which would occur in full speed operation. It is obvious that when

> an aeronautical propeller, say eight feet diameter, is operated at say 1200 revolutions per minute, centrifugal force adds to the structural rigidity due to the form of the propeller, a quasi or virtual or dynamic rigidity from the radial tension due to centrifugal force, and this added rigidity is a contingent advantage, but hitherto not regarded as an element which would justify omitting any considerable percentage of the elements providing static or intrinsic rigidity. This has much justification where the rotative speeds do not much exceed 1000 revolutions per minute. If, however, high rotative speeds are used, such for example, as say 5,000 to 15,000 revolutions per minute, the centrifugal force becomes such a large factor that a progressively less necessity exists for structural or intrinsic rigidity and I have ascertained by many experiments, and as can be easily calculated from well known laws of mechanics, that at certain rotative speeds, a stage or condition is reached where structural or intrinsic rigidity can be largely and to a substantial extent discarded in the design of the propeller and its construction, and reliance placed mainly upon the quasi or virtual rigidity of kinetic character due to centrifugal force.

The patentee further indicates that his invention may be practiced with a propeller having its blades made of either metal, an alloy of metal, wood, or a suitable composition, and that the material used may be flexible, pliable, ductile or malleable.

The patentee states that:

> I make my improved blade relatively thin and thinner than customary throughout, thereby dispensing with a large amount of material which has been required heretofore to give the blade the proper amount of rigidity, and which thin blade when operated at the high speeds herein referred to receives a degree of rigidity imparted thereto by radial tension sufficient to make it practically operative.
>
> By dispensing with the bulk necessary for intrinsic rigidity, my improved propeller wastes less power in friction and air resistance than propellers of the intrinsically rigid type, and it is therefore more efficient.

One important requisite set forth in the specification is that when the blade is of the required thinness, it will fulfill

the essential requirements herein stated. The patentee defines the term "relatively thin" in the following phraseology:

> The term relatively thin as used herein is intended to define a body whose maximum thickness is that of a metal plate as distinguished from the thinness of a metal sheet, on the one hand, and the thickness of a metal bar or like bulky body, on the other.
>
> It is to be noted that the flexing stresses of operation are slight at slow rotative speeds, as while getting up speed, the centrifugal force being also slight, but the degree of flexibility of my blades at various points is so proportioned that at every speed the centrifugal force supplements the intrinsic rigidity sufficiently for the necessary actual rigidity to meet the stresses at that speed.

23. The claims of the first patent in suit are as follows:

> 1. An aeronautical propeller having single piece blades constructed of material of such thinness as to require dependence *partly but mainly* upon the radial tension exerted by centrifugal force to maintain the blades in operative form or shape.
>
> 2. An aeronautical propeller having single piece blades of material which is flexible and dependent *partly but mainly* upon centrifugal force to give the blades sufficient rigidity to substantially overcome lateral deflecting forces tending to reduce efficiency.
>
> 3. An aeronautical propeller having single piece blades dependent for resistance to flexure caused by air *partly but mainly* upon the virtual rigidity imparted by radial tension due to centrifugal force.
>
> 4. An aeronautical propeller having one-piece blades dependent for resistance to flexure caused by air *partly and substantially* upon the virtual rigidity imparted by radial tension due to centrifugal force, and means combined therewith for rotating the propeller at a rate adequate to cause centrifugal force of the degree necessary for sufficient virtual rigidity.
>
> * * * * *
>
> 13. A metal aeronautical propeller whose blades are relatively thin and taper in thickness from root to tip and which depend for resistance to axial and tangential flexure by air during rotation *mainly* upon virtual rigidity imparted thereto by centrifugal force.

24. The material portions of the claims in suit, as set forth in finding 23, have been indicated by italicization.

The patent specification contains no specific figures or data relative to just how thin or how thick a given blade should be in order to depend *partly but mainly* upon centrifugal force resistance to flexure. The patent sets forth neither a maximum nor a minimum limit, nor any critical thinness between maximum or minimum. Specific values would vary in different propellers in accordance with such factors as engine power, speed, and air load.

The specification contains no data or instructions on how to construct the blades to resist torsional stresses and yet make them thin enough to depend partly but mainly upon centrifugal force for resistance to flexure.

The mathematical equations and methods necessary to determine the bending load or stresses due to air load alone, and the bending and tensile stresses due to centrifugal force were known to those skilled in the art at the time the Reed application, which materialized into the first patent in suit, was filed.

Structural rigidity (i. e., the ability to resist flexure by virtue of the physical characteristics of the propeller) and dynamic rigidity (i. e., the stiffening effect of centrifugal force) are terms susceptible of computation.

25. The second Reed patent in suit (No. 1,518,410) issued upon an application filed June 22, 1922, is in general similar to the first patent in suit in that it contemplates and describes the use of thinner blade sections through reliance upon the stiffening effect of centrifugal force or "dynamic rigidity."

It supplements the description of the first patent in two main respects as follows:

(a) It discloses the thought of tapering the blades in width as well as in thickness from the hub to the tip.

(b) It discloses metal blades made of specific material such as alloys of aluminum or duralumin.

The specification recognizes the detrimental effect of centrifugal force on torsional rigidity, stating on page 1 as follows:

> The effect of centrifugal force, while favorable to resistance of the blade to forward and tangential flexure under the influence of air resistance, may be unfavorable to permanence of the longitudinal twist given to

> the blades to give them the desired helical pitch, and to maintain this twist constant, the intrinsic rigidity of the blade must be sufficient to resist the influence of air resistance. While the centrifugal force is sufficient to supply the necessary rigidity against axial and tangential flexure to the thin sharp outer portions of the blades, yet the rigidity of the blades, against change of pitch is maintained, there is needed a correct adjustment of the weight of material to dimensions and form at the successive blade cross sections.

The specification also contains a description of specific propeller construction on page 4, the inventor stating:

> I have found that for an absorption of 400 H. P. with a 10-foot propeller at 2,000 R. P. M., and a pitch of 6 feet, a thickness at the bends or twisted portions of about ¾ of an inch, with a width of 10 inches will suffice, when one uses material such as duralumin, or similar aluminum alloy, of extra tensile strength and elastic limit. As the blades taper in thickness steadily to ¼ inch or ⅛ inch, or less, at the tips 5 and 6, and also taper materially in width outwardly toward the tips, the resulting lightening in weight toward the tips compensates for the increased radius, so that the blades may be calculated for a substantially uniform radial tension per unit of cross section and the aggregate of such radial tensions at the bends or twists near the axis region may be regulated not to exceed the amount which the bends or twists can sustain without straightening out under the duty for which the propeller is planned.

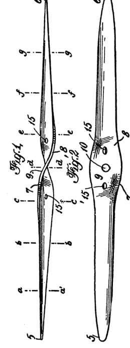
Figure 8 of this patent shows a propeller blade in which the tip portions are bent forwardly of a plane perpendicular to the axis of rotation. Such a construction is known in the art as a *compensated* propeller. (See finding 46.)

The patent states with reference to this construction that:

> In Figs. 8, 9, 10, 11, I show a variation in the construction of the propeller in which a virtual twist in the central part 7—8, for bringing the sections at those points to the required angle with the plane of rotation, is accomplished by a compound bend at 18—19, and 20—21, these bends being in opposite directions and at angles 18 with 19, and 20 with 21, and each extending entirely across the propeller and the pair 18—19, being symmetrical with the pair 20—21.

Reporter's Statement of the Case

Figures 1 and 2 of the patent reproduced herewith are illustrative of a form of blade tapering both in width and thickness.



FIGURES 1 and 2 of Patent No. 1,518,410.

Figure 8 is reproduced herewith:

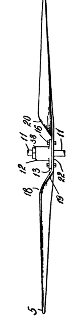


FIGURE 8 of Reed Patent No. 1,518,410.

26. The claims in suit of this patent are of two types. Claims 11, 12, and 13 are directed to a propeller blade formed of a given material, and claims 1, 5, 14, 15, and 16 are, in general, directed to propellers made from light-weight metal alloys tapering in thickness and requiring the supplemental stiffening action of centrifugal force for effec-

tive operation. These two groups of claims in suit are as follows:

11. An aeronautical propeller having blades formed of an alloy of aluminum.
12. An aeronautical propeller having blades formed of duralumin.
13. An aeronautical propeller having blades formed of forged alloy of aluminum.

*   *   *   *   *

1. An aeronautical propeller having blades formed of light-weight metal having a high degree of tensile strength and converging in cross-section toward the outer portions of the blades and depending *partly but mainly* upon centrifugal force for effective operation.
5. An aeronautical propeller having blades formed of duralumin or an alloy having substantially the physical characteristics thereof and said blades being of such thinness that the structural rigidity due to material and shape is not sufficient to produce the total rigidity which is necessary to overcome the resistances in operation *but has to be supplemented for an essential part* by the kinetic rigidity resulting from the centrifugal force.
14. An aeronautical propeller provided with blades formed of light-weight metal having a relatively high tensile strength, said blades having relatively thin outer portions and increasing in cross-section away from the outer portion and graded in width and cross-section only to the extent necessary to maintain the pitch twist of the blades.
15. An aeronautical propeller having metal blades converging in width and thickness toward the outer ends, said blades possessing a substantial degree of rigidity but the degree of convergence *being such as to require the supplemental stiffening action of centrifugal force for operation.*
16. An aeronautical propeller having blades formed of light-weight metal having a high degree of tensile strength, said blades converging in cross-section toward the outer portions thereof and *depending upon centrifugal force for effective operation.* [Italics ours.]

27. The term duralumin was originally applied to an alloy of alumnium developed by a Dr. Wilm in Germany. As first described in 1909 and 1910, it comprised an alloy of aluminum, copper, and magnesium, and about 1914 it comprised an alloy of aluminum, magnesium, copper, and man-

ganese. The usage of the term duralumin has now become more generic, and is now used by those skilled in aeronautical art as meaning, in general, a lightweight aluminum alloy.

With respect to the claims in suit of the second patent, which are directed to the utilization of centrifugal force (claims 1, 5, 15, and 16), they depend generally upon the same scope of disclosure of structural and dynamic rigidity as the first patent in suit and as set forth in finding 24, with the exception that in the second patent the importance of constructing a propeller with a sufficient degree of torsional rigidity is emphasized.

28. There is no satisfactory evidence of conception or reduction to practice of the inventions set forth in the claims in suit of the first patent, claims 1, 2, 3, 4, and 13, earlier than May 26, 1920, the filing date of the Reed application which materialized into this patent.

While Reed began his investigations on propellers in or about November 1916, and conducted a series of tests terminating in the construction of a full-sized propeller which was tested in actual flight on August 30, 1921, there is no corroborative evidence as to what these tests were or to what extent the various model propellers were dependent upon centrifugal force.

29. Some time between May 27, 1921, and August 30, 1921, Reed constructed a propeller known as the D-1 Propeller, which propeller is in evidence as defendant's (physical) exhibit 109.

This propeller which was constructed of forged and rolled duralumin (this term here is used in the generic sense) was flight tested on an aeroplane on August 30, 1921, and subsequently sent to the Engineering Division of the United States Army Air Corps at McCook Field, Dayton, Ohio, for tests, the results of these tests being given in a report of the War Department, defendant's exhibit 110, which is by reference made a part of this finding.

30. The D-1 Propeller consists of a single slab of duralumin. The central portion is appropriately shaped and perforated for installation in a conventional wood propeller hub, using spacer blocks to fill in the spaces between the

front and rear surfaces of the duralumin slab and the much more widely spaced flanges of the hub for a wooden propeller. The working portions of the blades, which are integral with the hub portion, are tapered in both width and thickness toward the tip. The blades are thin.

The flight test of this propeller establishes a date of conception and reduction to practice as of August 30, 1921, for claims 11, 12, and 13 of the second patent in suit.

No calculations or data have been presented relative to the degree of the contributing effect of centrifugal force against flexure or to determine how much the blades deflected under air load but without centrifugal force, or whether or not the blades required or depended upon centrifugal force to reduce the stresses therein to a safe limit. Neither is there any data or evidence as to whether the cross section of the blades at various stations was just sufficient to maintain the pitch of the blades.

31. There is no satisfactory evidence of a date of conception or reduction to practice of the inventions set forth in claims 1, 5, 14, 15, and 16 in suit of the second Reed patent, earlier than June 22, 1922, the filing date of the application which materialized into this patent.

THE ALLEGED INFRINGING STRUCTURE

32. The defendant's structure charged as an infringement in this case comprises an aeroplane propeller having two forged blades, each blade being of the helical type and adjustably held in common hub. Each blade changes in cross section from approximately circular at the hub portion to flat at the outer tip. The blades are on a straight radial axis and taper in thickness from root to tip, also tapering in width for the outer portion of the blade.

The dimensions of the propeller are shown by the stipulated drawings and specifications, plaintiff's exhibits 24 and 25, which are by reference made a part of this finding. This propeller is also exemplified by defendant's physical exhibit 48. The diameter of the propeller is 9 feet.

33. The blades are made from aluminum alloy forgings having a chemical composition in accordance with the U. S. Army Specification, plaintiff's exhibit 25, which is by refer-

ence made a part of this finding. This specification gives a composition of aluminum alloy (Grade 2) for "large forgings, such as propellers, crankcases, and similar parts," which is as follows:

Aluminum	92%.
Manganese	0.4 to 1.2%.
Silicon	0.5 to 1.20%.
Magnesium	0.01% max.
Copper	3.9 to 5.0%.

The ultimate strength of the material is a minimum of 55,000 pounds per square inch; minimum yield strength of 30,000 pounds per square inch; a minimum elongation of 16% in 2 inches; and a Brinell hardness (10 mm. 0.500 kg.) at surface.

This propeller is designed to rotate in normal operation in level flight at an altitude of 6,000 feet at 2,200 r. p. m. with an engine output of 525 horsepower.

34. Plaintiff has calculated the various stresses and tip deflections to which the defendant's propeller blade 30-735 is subjected in normal operation, these calculations being given in detail in plaintiff's exhibit 26, which is by reference made a part of this finding.

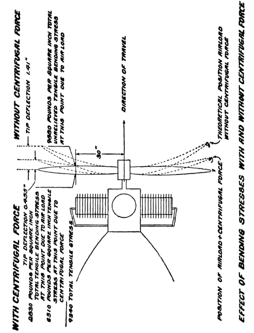
For the material used in defendant's propeller the allowable safe limit for stress is about 12,000 pounds per square inch.

The calculations which deal with tip deflections indicate that if defendant's propeller be theoretically contemplated as operating under the stipulated conditions of power and air load but *without any effect of centrifugal force* the tip deflection would be 1.41 inches, and the calculated tip deflection with centrifugal force present under the stipulated operating conditions would be 0.455 inches.

The theoretical tip deflection of 1.41 inches without the effect of centrifugal force is less than 4% of the diameter of the propeller (108 inches) and the aerodynamic efficiency of the propeller would not be measurably impaired by such deflection. (See finding 9, last paragraph.)

35. The calculations referred to in the previous finding indicate that the maximum bending stress occurs at 30 inches from the axis, or at the 30-inch station. The calcu-

lations show that under normal stipulated flight conditions and without the effect of centrifugal force, the bending stresses at the 30-inch station, due to air load alone, are 9,880 pounds per square inch.



With centrifugal force acting, dynamic rigidity is created and the propeller is not bent or deflected to the position it would assume with air load alone.

At the 30-inch station and with centrifugal force acting, the tensile bending stress is 2,830 pounds per square inch

due to air load to which is added a direct tensile stress due to centrifugal force of 6,510 pounds per square inch, making a total tensile stress of 9,340 pounds per square inch.

In order that the tip deflections and bending stresses may be visualized, there is reproduced herewith a diagram with the stresses, tip deflections, and explanatory legends shown thereon.

In the Government propeller the bending stresses have been reduced from 9,880 pounds to 9,340 pounds by the effect of centrifugal force, or 540 pounds per square inch, which represents a reduction of tensile bending stress of $^{540}/_{9880}$, or a reduction of 5.46%.

These calculations do not include torsion effects and other varying stresses.

Reference to this illustration in which 9,880 pounds tensile bending stress is present in position 2 (theoretical position due to air load without centrifugal force) shows the impossibility of adding to this value any stress due to centrifugal force, for as soon as the latter is assumed to be present, the propeller will assume position 3, with a tensile stress due to air load of 2,830 pounds.

36. All the claims in suit of the first Reed patent (1 to 4, inclusive, and 13, finding 23) specify as a part of the inventive concept that the propeller should be either mainly or substantially dependent upon centrifugal force for rigidity or resistance to flexure.

The Government propeller, as indicated by the above calculations, is not dependent upon centrifugal force for resistance to flexure or reduction of stresses below the safe limit of 12,000 pounds, and the terminology of these claims does not apply.

The Government propeller moreover is not a one-piece blade within the meaning and intent of the patent.

37. Claims 1, 5, 15, and 16 in suit of the second Reed patent (finding 26) also relate to and include dependency upon centrifugal force and the terminology of these claims is not applicable to the Government propeller.

38. Claim 14 in suit of the second Reed patent (finding 26) relates to a lightweight metal aeronautical propeller

with blades increasing in cross section from the tip toward the hub and containing the limiting phrase "*graded in width and cross section only to the extent necessary to maintain the pitch twist of the blades.*"

The patent specification is silent as to the power input and speed to which this limitation is applicable and the claim is indefinite.

There is no evidence that the Government propeller No. 30–735 is so constructed with reference to cross section *only to the extent necessary to* maintain the pitch twist of the blades under the stipulated conditions of engine output of 525 horsepower at 2,200 r. p. m.

A whirl test record of the Government propeller No. 30–735, plaintiff's exhibit 33, which is by reference made a part of this finding, on the contrary indicates that this propeller was successfully tested in a whirl test up to a speed of 2,400 r. p. m. with an input of 1,152 horsepower, the thrust curve continuing smoothly up to 2,400, indicating that there was no loss to thrust due to tip effect at 2,200.

The Government propeller therefore has not only width and cross section enough to maintain the pitch twist of the blades under normal operating conditions but will maintain this pitch twist under an ample margin of overload.

The phraseology of this claim cannot be applied to the Government structure.

39. Using the word "duralumin" in a generic sense, the Government propeller No. 30–735 is constructed of this material.

The phraseology of claims 11, 12, and 13, which relate, respectively, to an aeronautical propeller constructed of an alloy of aluminum, blades formed of duralumin, and blades formed of forged alloy of aluminum, is applicable to the Government propeller No. 30–735.

PRIOR ART AND KNOWLEDGE

40. The following patents and publications were available to those skilled in the art on the respective dates indicated:

Publication entitled "Aviation and Aeronautical Engineering" published December 1, 1917 (plaintiff's exhibit 30).

Report of the Advisory Committee for Aeronautics, No. 420, published in March 1918 (defendant's exhibit 50).

Periodical "Flight" published May 10, 1913 (defendant's exhibit 172).

U. S. Patent to Fauber, No. 971,030, patented September 27, 1910 (defendant's exhibit 163).

French Patent to Penaud and Gauchot, No. 111,574, patented February 18, 1876 (defendant's exhibit 162).

German publication "Technische Berichte," published March 20, 1918, and available to the public in this country on March 18, 1920 (defendant's exhibits 51 and 51A).

Catalogue on "Paragon Propellers" published about May 1919 (defendant's exhibit 75).

"Screw Propellers for Aircraft" by Henry C. Watts, published January 15, 1920, and available to the public in March 1920 (defendant's exhibits 95, 96, and 97).

"Manuel de L'Aviateur—Constructeur," by M. Calderara and P. Barnet-Rivet, published 1910 (defendant's exhibits 171 and 171A).

U. S. Patent to von Parseval, No. 954,992, patented April 12, 1910 (defendant's exhibit 173).

"Luftschrauben" by Bejeubir, published 1912 (defendant's exhibits 168 and 168A).

Periodical "Flight," published January 1909 (defendant's exhibit 164).

Periodical "Der Motorwagen" published September 10. 1909 (defendant's exhibits 165 and 165A).

French Patent to Esnault-Pelterie, No. 403,951, patented October 7, 1909 (defendant's exhibits 166 and 166A).

"Vehicles of the Air" by Lougheed, published 1909 (defendant's exhibit 167).

Periodical "Aerial Age Weekly," published December 2, 1918 (defendant's exhibit 170).

"Reports and Memoranda" No. 130, published June 1913 (defendant's exhibit 174).

French Patent to Drzewiecki, No. 519,759, patented January 31, 1921 (defendant's exhibits 169 and 169A).

"Theorie Generale de l'Helice," by S. Drzewiecki, published and placed on sale in France on December 20, 1919 (defendant's exhibits 198 and 198A).

The above enumerated exhibits are by reference made a part of this finding.

41. French patent to Penaud and Gauchot, No. 111,574 (defendant's exhibit 162), issued February 18, 1876, discloses an aeroplane having an aeronautical propeller of metal. A

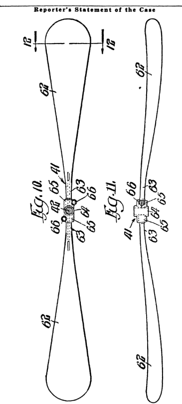
translation of the specification states with respect to the propeller as follows:

> The screws are entirely metal and preferably of steel. They are composed of a hub of spokes and of blades fixed to the spokes by screws, by rivets, or by bolts. These screws may have from two to twelve blades. We reserve giving the blades any shape of helicoidal surface known at the present time and used in marine practice: These blades may thus be warped curves and concave in any direction: Their edges will be trimmed to sharp bevels adapted to cleave the air: Their surface, still more advantageously than that of the wings, will be prepared so as to cleave the air and to slip over it as easily as possible. *The centrifugal force of these screws will contribute powerfully to prevent them from yielding under the pressure that the air exerts on them.* [Italics ours.]

42. The publication entitled "Aviation and Aeronautical Engineering" (plaintiff's exhibt 30) contains an article entitled "Air Screw Analysis." On page 606 of this article (page 6 of the photostatic copy in evidence) there is set forth a mathematical formula for determining centrifugal force at any cross section of a propeller blade and for determining the bending moment at any section of a straight radial blade. On page 601 (page 1 of the photostatic copy) there is disclosed in a drawing entitled "Propeller Blade Dimensions," an aeronautical propeller with blades having relatively thin outer portions and increasing in cross section away from the outer portions, the increase being both in width and thickness from the tip toward the hub for about one-third in length of the blade.

43. United States Patent to Fauber, No. 971,030, issued September 27, 1910 (defendant's exhibit 163), discloses what is known as an off-set or compensated propeller.

As shown in the drawings reproduced herewith, the propeller is constructed with separate blades, each blade having a cylindrical shank which is fitted into and secured to a central hub. The specification states that each blade and its shank will preferably be made of a single piece of nickel steel or other material of high tensile strength and rigidity, and also indicates that the blades have thin or sharp lateral or forward and rear edges adapted to lessen the resistance of the air.



FIGURES 10 and 11 of patent to Fauber, No. 971,030.

As shown in the drawings (figs. 10 and 11), the propeller is designed with the blades tilted or inclined forwardly of a plane perpendicular to the axis of rotation.

The specification states with respect to this form of construction that:

> * * *. The thrust of the outer parts of the blades on the air will manifestly tend to bend or deflect said blades forwardly or reversely to the direction of the thrust, but if the blades be inclined forwardly, as shown, the centrifugal force generated by the high speed of the propeller will tend to straighten the blades or throw them to a position perpendicular to the central axis of the shaft and to thereby counteract the effect of the thrust and to a large degree relieve the shanks of the blades of the leverage due to such thrust. The inclined arrangement of the said blades thereby largely avoids the liability of fracture of the blades under the combined action of centrifugal force, bending and vibration, it being manifest that the centrifugal action which tends to throw the outer ends of the blades rearwardly will counteract the thrust of the blades which tends to bend them forward, to such extent as to practically relieve the shanks of the blades from strains tending to break them. * * *

The specification also indicates that by reason of the counteracting effect of centrifugal force, the blades may be made light and thin.

44. The propeller disclosed in the periodical "Flight" published May 10, 1913 (defendant's exhibit 172), is the "Garuda" propeller. In this propeller, which is of the compensated type, the restoring action of centrifugal force opposes the bending action of the air load. The publication discloses the extreme narrowness of the "razor-shaped blades," and that the blades are set at a slight dihedral angle; that the centrifugal force causes a backward component of force to oppose the forward component of the air pressure on the blades, with the result that practically the entire air load on the blades is relieved so that they have to sustain nothing but the centrifugal pull, and that the propeller is extremely elastic.

The purpose of the use of centrifugal force in this "Garuda" propeller was to relieve the bending stress due to thrust, particularly at the roots of the blades.

45. Reports and memoranda No. 420 of the Advisory Committee for Aeronautics, published in March 1918 (de-

fendant's exhibit 50), discloses in Figure 3 a wooden propeller having blades tapered in width and thickness and of the compensated type. This article contains a detailed discussion of formulae and methods of computing stresses, due to centrifugal force and air load.

The design computations relating to the propeller shown in Figure 3 appear in Tables 4 and 5 in this article. These tables include separate values of stresses due to the air and stresses due to centrifugal force.

The article does not state the kind of wood of which the propeller under discussion is made, nor does it give the ultimate fracture stresses.

This publication discloses to those skilled in the art that the structural rigidity of an aeronautic propeller may be supplemented by the effect of centrifugal force to reduce the bending stresses due to air load; and the article gives to those skilled in the art the necesary mathematical formulae by means of which the degree of dependency upon centrifugal force may be calculated in a propeller design.

46. The effect of stresses in propellers of the compensated type, described in findings 43 to 45, may be visualized by reference to the exaggerated diagram reproduced in finding 12.

The compensated type of propeller is constructed with its tips bent forward, such as are indicated in this illustration by position 3. The stress due to air load when the propeller is in operation tends to bend the propeller blades into the position indicated at 2, while the effect of centrifugal force tends to place the propeller in a plane perpendicular to its axis of rotation as indicated by position 1.

A compensated type of propeller may be designed so that for a given rotational speed and a given air load, the effect of centrifugal force will *entirely relieve* the bending effect of air load and at the given speed and load there will be no tendency whatever for the propeller to bend or flex forwardly. If the air load is increased as in a climb and the speed is not increased the thrust force will then tend to deflect the blade forward, the centrifugal force *partly* relieving the thrust load.

If the air load is relieved as by diving the aeroplane, the centrifugal force will predominate and will tend to bend the blade toward the vertical plane through the axis of rotation.

47. The prior publication "Manuel de l'Aviateur-Constructeur," published in 1910 (defendant's exhibits 171 and 171A), teaches that when an inclination is given to the blades of an aeronautical propeller, each section of each blade is subject to the thrust force and to the action of centrifugal force; that the thrust force tends to deflect the blade forward, and the centrifugal force exerts a radial tension on the blade so that the blade tends to be inclined along the resultant of these two forces; that this is accomplished by inclining each blade a few degrees or by using flexible blades; that when the propellers are made of metal and are somewhat heavy, it is advisable to incline the blades slightly on account of the effect of centrifugal force, but if the blades of the propeller are flexible and elastic the precaution of inclining the blades is unnecessary.

This article also sets forth a mathematical formula for computing the effect of centrifugal force.

48. The publication "Technische Berichte" (defendant's exhibits 51 and 51A) published in Germany, March 20, 1918, and available in this country March 18, 1920, contains an article entitled "The Bending Stresses of Propeller Blades and the Relieving Action of Centrifugal Force."

The introductory paragraphs contain the statement that up to the time of the writing of the article the problem of relieving the bending stresses by centrifugal force had been obtained by tilting the blade forward (compensated propellers) but that such relief must also occur with the blade axis at right angles of the axis of the deflection (radial propellers). The article discloses that as soon as a propeller blade is deflected, centrifugal force will act to relieve the bending moments of the blade.

The publication also discloses a series of mathematical calculations and formulae, and states that the approximate blade tip deflection having been determined, the comparative importance of the relieving moments of centrifugal force

can be seen from a mathematical equation set forth by the author.

The publication concludes with two examples of the formulae and equations in which the deflection of the blade tips is reduced by the centrifugal force a total of about 25 or 30 percent.

The term used in this article "relieving moment of centrifugal force" is synonymous with the terms used in the patents in suit such as "dynamic rigidity" or "virtual rigidity."

49. The prior publication "Screw Propellers for Aircraft," by Watts, published January 15, 1920, and available to the public in March 1920 (defendant's exhibits 95, 96, and 97), teaches that if the centers of area of the blade sections of an aeronautical propeller all lie on a straight radial line passing through and perpendicular to the axis of rotation, the deflection of this line due to the deflection of the blade under the influence of the bending moment due to the air load, will again allow the centrifugal force to set up a bending moment. This latter bending moment will be acting in the opposite direction to the bending moment due to the air load and will tend to neutralize it. The term "centers of areas" used in this disclosure means centers of gravity of the blade sections.

This publication discloses that the action of centrifugal force on the blades of aeronautical propellers which were built on a straight radial line was known prior to May 26, 1920, and that centrifugal force in such propellers tended to neutralize the effect of the air load on the blades of such propellers.

This publication contains extensive mathematical formulae for computing stresses and specific examples of computed propeller design, together with calculated stresses set out in tabular form.

50. United States patent to von Parseval, No. 954,992 (defendant's exhibit 173), issued April 12, 1910, discloses a propeller in which the blades are made of fabric and are entirely devoid of structural rigidity.

Pliant weight material, such as ropes or chains, together with transverse rods, is built into the blades, the ropes or chains being inserted in the leading edge of the blades.

When the propeller is in rotation the action of centrifugal force upon the weight material incorporated into the blades pulls the blades into operative shape.

These propellers are *entirely dependent* upon dynamic rigidity resulting from the action of centrifugal force.

51. The publication "Reports and Memoranda, No. 130" (defendant's exhibit 174), published June 1913, is a report of trials of a naval airship or dirigible. The following description of the propellers is incorporated in this report:

> *Propellers.*—These are four-bladed, reversible, of the Parseval patent type. The blades are of thin sheet steel shrouded on the leading edge only. The pitch is set by a small lever actuating a bicycle chain leading out to the propeller bosses. The principle of this type of propeller is as follows: The lower or boss end of the blade is set at the desired pitch, the flexibility of the thin steel sheet allowing the blade to take up a position along the resultant of the two forces (thrust and centrifugal force) acting on it, the blade thus being in tension only. A test of these propellers on the ground gave a thrust of just over 6 lbs. per h. p.

52. The German publication "Luftschrauben" (defendant's exhibits 168 and 168A) published in 1912, is an article entitled "Book of Instruction for the Construction and Treatment of Propellers." This publication discloses stresses upon the blades of aeronautical propellers with reference both to centrifugal force and the deflecting moment of the thrust. The article states:

> * * * For this reason, semi-stiff propellers have been built recently, whose arms are not so limp as to collapse entirely, when standing still, although their stiffness is yet so small that a considerable centrifugal force is needed to produce the necessary thrust.

The article further suggests to those skilled in the art that aluminum may be employed for the blades of an aeronautical propeller, this being utilized by means of forming dies of cement; and the appendix to the article sets forth a

table of strength values for propeller materials, the table giving the tensile and the elastic elongation.

Included in the table are the following materials:

Aluminum pure
    cast
    forged
    sheet, 2mm, hard
Aluminum alloys
    with 4% copper sheet
    8 mm by B&S
    cast
    rolled
    tubing
Aluminum-Bronze
    forged (according to Al-content)
Magnalium annealed
    electron cast
    compressed
Duralumin sheet
    7mm
    4mm
    2mm
    Forgings and pressings.

53. The publication "Flight," published January 1909 (defendant's exhibit 164), contains an article on aeroplane propellers. This article contains a table of propellers giving the name of the aeroplane and the maker of the propeller with a brief description. It discloses six propellers having aluminum blades mounted on steel tubes and including a Bleriot propeller stated to be "flexible." It also refers to a Breguet propeller as having hollow aluminum flexible blades; variable pitch.

54. The German publication "Der Motorwagen," published September 10, 1909 (defendant's exhibits 165 and 165A), contains a drawing and description of the Bleriot propeller and its principal dimensions. The blades are attached to sheet steel metal arms by means of rivets. The blades themselves are stated to be hammered out of aluminum sheet of about 3/16 inch thickness, ground sharp on the leading and trailing edges, and slightly rounded off at the tips.

55. The French patent to Esnault-Pelterie, No. 403,951 (defendant's exhibits 166 and 166A), issued October 7, 1909, discloses a two-bladed aeronautical propeller of steel or aluminum, made by casting or forging the two blades as one block of metal without any pitch. The block is then twisted or forged to form the blades with the desired pitch. The blades diminish in thickness from the center toward the periphery. Aluminum or steel is chosen because of the lightness and strength of such metals.

56. The prior publication "Vehicles of the Air," published 1909 (defendant's exhibit 167), discloses an illustration (Figure 99) of a four-bladed aeronautical propeller mounted on an engine. This propeller is stated to be a four-bladed R. E. P. (Robert Esnault-Pelterie) construction driven by a R. E. P. engine and having blades of magnalium fastened into steel arms.

On page 269 of this publication, magnalium is referred to as one of the best of the aluminum alloys which is both lighter and stronger than pure aluminum and lends itself readily to casting, forging, stamping, and machining.

57. The prior publication "The Aerial Age Weekly," published December 1918 (defendant's exhibit 170), contains an article entitled "The Metal Airscrew." This article refers to steel, aluminum, and duralumin as suitable materials for aeronautical propellers.

58. The French patent to Drzewiecki, No. 519,759 (defendant's exhibits 169 and 169A), discloses an aeronautical propeller having blades of constant thickness and width. The patent states that the object of the present invention is to design a blade made of metal, preferably of duralumin, which is superior to any other metal, so as to permit the construction of a lighter propeller for the same blade width and thickness.

The patent indicates that the propeller is of the compensated type, stating that the same is bent to a compensated curve established in such a manner that the moment of pressure on the blade is approximately balanced by the moment of the centrifugal force at every point.

59. The publication "Theorie Generale de l'Helice," by S. Drzewiecki, published by Gauthier-Villars et Cie, at Paris, France, and placed on sale in France on December 20, 1919 (defendant's exhibits 198 and 198A), is a publication relating to the general theory of propellers.

Chapter VIII contains a discussion of the mechanical resistance of an aeronautical propeller to centrifugal force and thrust. Certain formulae are set forth in connection with a compensated propeller, it being stated that "it can be so arranged that the bending moment for each transverse section of the blade is nullified by an equal and opposing moment due to the centrifugal force; in this way one will obtain a *compensated* propeller."

This publication sets forth certain data to be used in connection with the formulae for calculating the factor of safety for a propeller made of duralumin.

PRIOR PUBLIC USE

60. In 1910 at Pawtucket, Rhode Island, Stuart Bastow publicly used and successfully flew a lighter-than-air aircraft. This aircraft was propelled by means of a metal aeronautical propeller constructed by Stuart Bastow and Victor W. Page. An article written by Page and published in the New England Automobile Journal on November 26, 1910, describes the flight and contains a photograph of the airship and the propeller.

This publication, defendant's exhibit 103, which is by reference made a part of this finding, describes the propeller as being 6 feet 9 inches in diameter with the blades set so that a pitch of 5 feet per revolution was obtained, and states that the materials used in its construction were steel and aluminum, weighing but 12 pounds.

The original propeller is in evidence as defendant's physical exhibit 105. It is a two-bladed propeller and consists of an aluminum hub into which two pieces of steel tubing are screw-threaded. The end of each tube is flattened, and the blades of the propeller which are made of aluminum sheets are attached by rivets to the flattened tubing.

A chemical analysis of the propeller shows the same to contain—

Copper	0.8 per cent.
Silicon	0.26 per cent.
Iron	0.34 per cent.
Aluminum	balance.

The small amounts of copper, silicon, and iron were accidental impurities in the aluminum.

61. Prior to May 26, 1920, the filing date of the first Reed patent in suit, it was known by propeller designers and those skilled in the art that—

(a) an aeronautical propeller should be as light in weight and have blades as thin as possible concomitant with ample strength and resistance to wear and fracture;

(b) both wood and metal were suitable materials of which to construct an aeronautical propeller, and both had been used;

(c) the action of centrifugal force and the bending stresses in both wooden and metal propellers were known, and numerous formulae had been developed for computing the effects of centrifugal force and bending stresses.

62. It was known to those skilled in the art prior to 1920, that aeronautical propellers of both wood and metal could be designed as—

(a) a radial propeller with blades having the centers of gravity of their sections on a straight radial line;

(b) as a compensated propeller with blades which were tipped forward of a straight radial line.

In both types of propellers the action of centrifugal force was known and utilized for the reduction of deflections and stresses due to the air loads, and the use of centrifugal force or dynamic rigidity to relieve the blades from the effects of the air load extended from a partial dependency to a dependency of 100 percent as in the case of a compensated type of propeller.

It was also known that by using centrifugal force to relieve the stresses due to the air load, the blades could be made light and thin.

63. It was known to those skilled in the art prior to May 26, 1920, that propeller blades should be relatively thin and tapered in thickness and width toward the tip, and that a blade should be made sufficiently heavy throughout all its cross section to maintain its shape and its pitch under load and torsional stresses.

64. Prior to May 26, 1920, the date of the filing of the first patent in suit, and prior to August 30, 1921, the date of conception and reduction to practice of the concept embodied in claims 11, 12, and 13 of the second patent in suit, it was known to those skilled in the art that aluminum and forged alloys of aluminum, such as duralumin and magnalium, were satisfactory building materials for aeronautical propellers.

The physical characteristics of these materials were well known and published prior to the above dates, and the use of aluminum or alloys of aluminum, such as duralumin, accomplished no new or unexpected results, and the use of these materials amounts to no new discovery of novel and previously unknown materials for aeronautical propellers.

For convenience, claims 11, 12, and 13 of the second patent in suit are again quoted as follows:

> 11. An aeronautical propeller having blades formed of an alloy of aluminum.
>
> 12. An aeronautical propeller having blades formed of duralumin.
>
> 13. An aeronautical propeller having blades formed of forged alloy of aluminum.

The phraseology of these claims does not specify anything previously unknown to those skilled in the art and these claims are not directed to novel subject matter and are invalid.

65. Claims 1, 2, 3, 4, and 13, the claims in suit of the Reed patent No. 1,463,556, are invalid and not infringed.

Claims 1, 5, 14, 15, and 16 in suit of the Reed patent No. 1,518,410, are invalid and not infringed.

Claims 11, 12, and 13 of the Reed patent No. 1,518,410, are invalid.

The court decided that the plaintiff was not entitled to recover.

JONES, *Judge*, delivered the opinion of the court:

Plaintiff seeks to recover for alleged infringement of two patents granted on application of Sylvanus A. Reed for improvements in "aeronautical propellers."

The first Reed patent is directed to certain principles involving the utilization of the effect of centrifugal force in order to give the propeller blades the rigidity necessary to resist the stresses in the blades. The second Reed patent is in general similar to the first patent, but relates more particularly to metal propellers and the use of certain alloys for their construction. Plaintiff alleges that both patents are infringed by the manufacture by or for and use by the United States of aeroplane propellers embodying the inventions covered by such patents.

Defendant contends that neither patent in suit gives sufficient information to enable those skilled in the art to practice the alleged invention; that the defendant does not infringe either patent, and that neither patent discloses any feature of novelty in view of the prior art.

The essential facts established by the record in this case are fully set forth in the findings, and except in connection with the controverted issues it is unnecessary to refer to them in detail.

Both of the patents in suit became the property of plaintiff; the first by assignment and the second by assignment of application and the subsequent issuance of patent direct to the company.

Findings 7 to 20, inclusive, have reference to an aeronautical propeller and the forces which act upon it in its operation. The forces and stresses which have particular bearing upon the patents in suit and the issues before us are graphically set forth in the drawing included in Finding 12, it being illustrated therein how the thrust or pull of the propeller blade has a tendency to bend the blade forward, and how the centrifugal force, which acts in the plane of rotation of the blades, has a tendency to counteract the bending effect of the thrust.

The co-action of these two forces, as described and illustrated in the findings, has been, is, and always will be present in every propeller blade that has been or will be constructed, and the effects have been recognized for many years. In this connection we refer to the following quotation from the French patent to Penaud and Gauchot (Finding 41), issued February 18, 1876, which discloses an aeroplane having metal propellers. The Penaud and Gauchot specification states with reference to the propellers that

> The centrifugal force of these screws will contribute powerfully to prevent them from yielding under the pressure that the air exerts on them.

In other words, what is graphically shown in Finding 12 was known as early as 1876.

THE FIRST PATENT IN SUIT (REED PATENT 1,463,556)

A discussion of this patent requires consideration of two aspects: First, the disclosure of the alleged improvement contained in the specification for the purpose of enabling one skilled in the art to practice the invention, and, second, the alleged monopoly claimed by the inventor as novel features of his invention, predicated upon the phraseology of the claims in suit.

Section 4888 United States Revised Statutes provides that the inventor of an invention

> * * * shall file in the Patent-Office a written description of the same, and of the manner and process of making, constructing, compounding, and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same; * * *

In the introductory portion of the specification the inventor makes the following statement:

> My invention relates to propellers for air craft and flying machines and discloses a novel principle for obtaining the necessary rigidity of the propeller blades to resist the stresses, thereby making possible the use of much thinner blades than heretofore with a gain in efficiency.

> Heretofore aeronautical propellers have been made of material such as wood or metal constructed to be structurally rigid against operative stresses, such rigidity usually being substantially sufficient, even when at rest, to resist tangential axial and radial stresses which would occur in full speed operation. It is obvious that when an aeronautical propeller, say eight feet diameter, is operated at say 1,200 revolutions per minute, centrifugal force adds to the structural rigidity due to the form of the propeller, a quasi or virtual or dynamic rigidity from the radial tension due to centrifugal force, and this added rigidity is a contingent advantage, but hitherto not regarded as an element which would justify omitting any considerable percentage of the elements providing static or intrinsic rigidity.

This quotation indicates that the essence of Reed's thought is that the stiffening effect due to centrifugal action is obvious, a statement well borne out by the Penaud and Gauchot patent of 1876, but that those skilled in the art as exemplified by propeller designers have not taken this stiffening effect into consideration for the purpose of omitting any *considerable* amount of the physical material previously thought necessary to obtain sufficient rigidity in operation. The patentee then goes on to state that at high rotative speeds the centrifugal effect increases, and that he has ascertained by many experiments that at certain speeds the structural rigidity can be discarded to a substantial extent, and reliance placed mainly upon the stiffening effect due to centrifugal force. The patentee further states that this "can be easily calculated from well known laws of mechanics."

The alleged discovery or principle which the inventor attempts to teach the public by means of the specification is dependency upon the contributing effect of centrifugal force to a degree or extent previously not contemplated by the propeller designer. This degree is defined by the following vague and indefinite statements contained in the specification.

On page 1, lines 15–17, it is stated with respect to the disclosure of the alleged novel principle, that it makes "possible the use of much thinner blades than heretofore with a gain in efficiency."

On page 2, lines 103–104, the specification states:

> I make my improved blade relatively thin and thinner than customary throughout * * *.

The specification also states on page 3, lines 59–64:

> The term relatively thin as used herein, is intended to define a body whose maximum thickness is that of a metal plate as distinguished from the thinness of a metal sheet, on the one hand, and the thickness of a metal bar or like bulky body, on the other.

The term "thinner than customary" and the term "thinner blades than heretofore used" are both as difficult and obscure in definition as is the difference between a metal plate as distinguished from a metal sheet. To predicate a disclosure to those skilled in the art upon such indefinite phraseology gives no help or aid to the propeller designer skilled in the art, who is entitled under the patent statutes to such a sufficiently clear disclosure by the specification as will enable him to know what propellers might be safely used or manufactured without practicing the Reed invention or discovery and which might not, and to arrive at this knowledge without the necessity of experimentation.

Referring next to the monopoly asserted in the claims in suit of the first Reed patent, these are fully set out in Finding 23. For the purpose of their consideration, as the claims are more or less similar in character, it is sufficient to quote claim 1:

> 1. An aeronautical propeller having single piece blades constructed of material of such thinness as to require dependence *partly but mainly* upon the radial tension exerted by centrifugal force to maintain the blades in operative form or shape. [Italics ours.]

The only distinction which the claims attempt to make with respect to the prior art is one of proportion, and the phrase "partly but mainly" used by the patentee is for this purpose.

The prior art pertinent to this first patent is set forth in detail in Findings 42–45 and 47–52, inclusive. We have already made reference to the Penaud and Gauchot patent of 1876, and its reference to the contributing stiffening effect of centrifugal force contained therein. *Entire* dependency upon centrifugal force to produce dynamic rigidity is taught in the United States patent to von Parseval (Finding 50), in which the blades were made of fabric and entirely devoid of structural or inherent rigidity.

Partial dependency upon centrifugal force is suggested to those skilled in the art by the German publication "Luftschrauben" (Finding 52). This article includes the statement

> * * * For this reason, semi-stiff propellers have been built recently, whose arms are not so limp as to collapse entirely, when standing still, although their stiffness is yet so small that a considerable centrifugal force is needed to produce the necessary thrust.

The publication "Technische Berichte" (Finding 48), discloses mathematical calculations and formulae and states that the approximate blade tip deflection having been determined, the comparative importance of the relieving moments of centrifugal force can be seen from a mathematical equation set forth by the author. The publication concludes with two examples of the formulae and equations in which the deflection of the blade tips is reduced by the centrifugal force a total of about 25 or 30 percent.

With this prior art to which we have specifically referred, as well as the other prior art set forth in the findings, as a background, the words "partly but mainly" used to define an alleged novel principle of dependency upon centrifugal force are far from clear in their meaning. The word "partly" possibly creates a line of demarcation between the United States patent to von Parseval but does not with respect to the other prior art referred to.

The word "mainly" probably implies that the claims define a blade so thin that it would be dependent upon centrifugal force to an extent greater than 50 percent, but if this be true what is the criterion to which such a numerical value is to be applied? Is it the degree of tip deflection due to air load or is it the ultimate strength or rupture value of the material, the minimum yield strength of the material, or an arbitrary assumed figure by propeller designers and termed the "safe limit" for stresses? The only light that the patentee attempts to shed on such a limit or criterion is the statement on page 1 that

> There are two limiting considerations in the design or construction and operation of my improved construction of propellers—first, the limit of rupture, and—

second, the limit of propeller efficiency measured by the ratio of thrust at stated flying velocities to torque.

The patent monopoly, instead of being expressed in concise and exact terms in accordance with the statute, is left largely to the individual opinions of various propeller designers, and the lack of any definite criterion indicates that various persons would interpret the claims differently, and therefore they are ambiguous. We are of the opinion that this patent does not fulfill the requirements of the patent statutes and is therefore void.

In *General Electric Co.* v. *Wabash Appliance Corporation et al.*, 304 U. S. 364, 369, the court said:

> Patents, whether basic or for improvements, must comply accurately and precisely with the statutory requirements as to claims of invention or discovery. The limits of the patent must be known for the protection of the patentee, the encouragement of the inventive genius of others, and the assurance that the subject of the patent will be dedicated ultimately to the public. The statute seeks to guard against unreasonable advantages to the patentee and disadvantages to others arising from uncertainty as to their rights. The inventor must "inform the public during the life of the patent of the limits of the monopoly asserted, so that it may be known which features may be safely used or manufactured without a license and which may not."

See *Isham* v. *The United States*, 76 C. Cls. 1, and *Hamacek Marine Corporation* v. *The United States*, 88 C. Cls. 369.

In addition to lack of clarity in the specification and claims, it should be observed that the claims obviously purport to cover a wide range of possible propeller blades, sizes, speeds, and engine-power combinations, as well as a variety of propeller materials, and that neither the claims nor the specification give any exact sizes, dimensions, or formulae for their determination. The prior art previously referred to includes many suggested propellers, together with formulae, the use of which will permit the propeller designer to rely to any desired extent upon the beneficial effects of centrifugal force, and we do not believe that there is invention in the claims in suit of this patent.

Taking up next the issue of infringement, the specifications and data relative to the Government propeller charged as infringing in this case, are set forth in detail in Finding 42. This is an aluminum alloy propeller 9 feet in diameter, designed to be normally operated at 2,200 r. p. m. with an engine output of 525 h. p.

The calculations which deal with tip deflections indicate that if defendant's propeller be theoretically contemplated as operating under the stipulated conditions of power and air load, but without any effect of centrifugal force, the tip deflection would be 1.41 inches, and the calculated tip deflection with centrifugal force present under the stipulated operating conditions would be 0.455 inches.

The theoretical tip deflection of 1.41 inches without the effect of centrifugal force is less than 4% of the diameter of the propeller (108 inches) and the aerodynamic efficiency of the propeller would not be measurably impaired by such deflection.

Therefore, in so far as tip deflection might be regarded as a criterion with which to measure the restoring effect on centrifugal force, this propeller is not at all dependent upon centrifugal force to maintain its rigidity, and there would be no infringement from this standpoint.

In the present instance, however, plaintiff utilizes as a criterion or measure, the allowable safe limits for stress in this propeller, which is 12,000 pounds per square inch. The maximum bending stresses occur at 30 inches from the axis of the hub of the propeller, and the calculations indicate that under the normal operating conditions of the propeller, but under the hypothetical assumption that centrifugal force is entirely absent, the bending stresses at this point, due to air load alone, are 9,880 pounds per square inch. As this value is below the safe stress limit of 12,000 pounds, the Government propeller is not mainly dependent upon centrifugal force for a reduction of stresses below the safe operating value, and the claims in issue are not infringed with this stress value used as a criterion.

In actual operation of the propeller, however, centrifugal force is and must always be present. It can be stated that the

action of centrifugal force has what might be termed both a beneficial and a detrimental effect, or, to use conventional bookkeeping parlance, centrifugal force requires an entry on both the debit and credit sides of the ledger. The detrimental or debit item is the additional tensile stress added to the blade by virtue of its rotating mass, and in the Government propeller this gives an added or direct tensile stress of 6,510 pounds per square inch. The beneficial or credit effect of centrifugal force is that the propeller is not bent or deflected to the degree it would assume with the air load alone, but to an intermediate degree in which the tensile bending stress due to air load is 2,830 pounds per square inch instead of 9,880 pounds per square inch, the figure previously given for the maximum stress due to air load alone when the propeller was theoretically contemplated as functioning without any effect due to centrifugal force.

The action of centrifugal force in the Government propeller therefore contributes a net resultant reduction in tensile bending stress from 9,880 to 9,340 pounds (air load stress 2,830 plus centrifugal force stress 6,510), which is a reduction of 5.46%. What we have stated here is graphically shown in the drawing entitled "Effect of bending stresses with and without centrifugal force" and forming a part of Finding 35. Calculated in this manner there is no main reliance upon the stiffening effect of centrifugal force.

Plaintiff has taken an exception to Finding 35 and the drawing contained therein on the ground that the method of computation is erroneous. Plaintiff's suggested computation is based upon a total tensile stress figure of 16,390 pounds obtained through the addition of the bending stress of 9,880 pounds present due to air load alone, the value obtained when the propeller is theoretically contemplated as operating without any effect due to centrifugal force, plus a direct tensile stress of 6,510 pounds, which is direct tensile stress due to centrifugal force, or what we have previously termed the detrimental or debit effect of centrifugal force. Plaintiff then compares this total figure of 16,390 with the final resulting stress on the propeller with centrifugal force present of 9,340 pounds, and by proportionate comparison of these two figures argues that there is resultant reduction in

tensile bending stress of 71.4%, i. e., that the Government propeller depends mainly upon the contribution of centrifugal force.

Such calculations are clearly in error. In the first instance, it is improper to add the direct tensile stress, due to centrifugal force, of 6,510 to the bending stress due to unrelieved air load. In doing this, plaintiff is using the debit side of the bookkeeping account with respect to the item of centrifugal force, and is neglecting the credit side. Second, when centrifugal force is contemplated as being present, as it must be to obtain the direct tensile stress, due to centrifugal force, of 6,510, the bending stress due to air load is not and can not be 9,880, for the presence of centrifugal force will prevent deflection of the propeller to an extent necessary to obtain this value; and third, the total stress figure of 16,390 pounds used by plaintiff is in itself erroneous, in that when the propeller is contemplated as operating without any relieving effect or any centrifugal force whatsoever, the bending stress of the Government propeller due to air load alone under these conditions is only a maximum of 9,880 pounds.

It is our opinion that claims 1, 2, 3, 4, and 13, the claims in issue of the first Reed patent in suit, even if they were not invalid, are not infringed by the Government structure.

THE SECOND PATENT IN SUIT (REED PATENT 1,518,140)

This patent is in general similar to the first patent, being also directed to an aeronautical propeller so designed as to be dependent upon centrifugal force for its effective operation.

The specification differs from or supplements the description contained in the first patent in two main respects, first, in that it discloses the thought of tapering the blades in width as well as thickness from the hub to the tip, and second, in that it discloses metal blades made of a specific material, such as alloys of aluminum and duralumin.

In addition, the specification refers to the necessity of making the blades strong enough to maintain rigidity of the blades against the change of pitch. In order to do this, the patentee states that "there is needed a correct adjustment of the weight of the material to dimensions and form at the

successive blade cross sections." The effect of torsion stresses is fully set forth in Findings 14–18, inclusive, and it is sufficient to state that these are the stresses to which the patentee has reference when he refers to maintaining the rigidity of the blades against change in pitch.

The claims relied upon by plaintiff may be divided into two groups, the first group, comprising claims 1, 5, 14, 15 and 16, being directed to the constructional features of light-weight metal propellers, and claims 11, 12 and 13 being directed to the material or composition of a propeller blade. Claims 1, 5, 15 and 16, which are set out in detail in Finding 26, contain the following defining phraseology with reference to the utilization of centrifugal force:

> Claim 1 * * * depending partly but mainly upon centrifugal force for effective operation.
> Claim 5 * * * but has to be supplemented for an essential part by the kinetic rigidity resulting from the centrifugal force.
> Claim 15 * * * being such as to require the supplemental stiffening action of centrifugal force for operation.
> Claim 16 * * * depending upon centrifugal force for effective operation.

Insofar as these claims specify the degree or extent to which centrifugal force is employed, they fail to define a patent monopoly with any more clarity than similar type of claims of the first patent.

We have already discussed the lack of dependency upon centrifugal force to any great extent by the Government propeller, and the failure of a claim containing phraseology of this indefinite character to comply with the patent statutes and to enable one skilled in the art to readily elect whether he should manufacture or use within or outside of the patent monopoly. What we have previously stated with respect to the first patent in suit also applies to claims 1, 5, 15 and 16 of the second patent. These claims are not infringed and are invalid.

Claim 14 of the second Reed patent is directed to a metal aeronautical propeller with blades increasing in cross-section from the tip toward the hub and containing the limiting phrase "graded in width and cross section only to the

extent necessary to maintain the pitch twist of the blades."

An aeronautical propeller with blades increasing in cross-section away from the outer portions and toward the hub is disclosed in a drawing included in the prior art publication "Aviation and Aeronautical Engineering" available to those skilled in the art more than two years prior to the filing date of the second patent in suit (see Finding 42). The above quotation from this claim is indefinite as to meaning, for the patent specification gives no criterion as to power input or speed to which this limitation is applicable. Does this phrase contemplate normal power and propeller speed or maintenance of pitch twist at increased power and speeds such as might be present in a power dive?

We find it impossible to visualize what kind of a bridge an engineer would build if he were given a contract to construct a bridge designed in "*cross-section only to the extent necessary to maintain*" the bridge. Would this mean that if the normal expected load was 4 tons he would build a bridge that would collapse if a vehicle weighing 8,005 pounds attempted to cross it, or would he ask us what factor of safety we desired in such a bridge, or would he follow conventional construction and build the bridge so that it might successfully resist a load of 8 tons without collapse, and thus have a factor of safety of two? Certainly if this latter construction were followed, the bridge would no longer conform to having "a cross-section *only to the extent* necessary to maintain" a 4-ton load. We have used this simile to better emphasize the difference between the Government propeller and this particular phraseology of claim 14. As set forth in the findings and in particular in Finding 38, the Government propeller which is designed to rotate in normal operation at 2,200 r. p. m. with an engine output of 525 h. p. is constructed strong enough not only to maintain its pitch twist under these stipulated conditions, but in addition has an ample factor of safety, in that the whirl test of this same propeller indicates a smooth thrust curve up to 2,400 r. p. m. with a power input of 1,152 h. p., or more than twice the normal power input. We are therefore of the opinion that this claim also comes within the category of indefiniteness with respect to patent monop-

oly, and is invalid, and that the Government propeller does not infringe this claim.

The claims in issue of the second patent, which are directed to the material or composition of aeronautical propellers, are as follows:

> 11. An aeronautical propeller having blades formed of an alloy of aluminum.
>
> 12. An aeronautical propeller having blades formed of duralumin.
>
> 13. An aeronautical propeller having blades formed of forged alloy of aluminum.

Duralumin was originally a trade name for one or more alloys of aluminum developed by a Dr. Wilm in Germany about 1909. The usage of the term "duralumin" has now become more generic and is now understood by those skilled in the aeronautical art as meaning in general a light-weight aluminum alloy. As thus used the term is applicable to the material used in the construction of the Government propeller, and the phraseology of the three material claims is also applicable to the Government structure.

The scope of these claims is such that they would be infringed by any aeronautical propeller made of the material specified, whether solid or hollow, and irrespective of the dimensions, power or shape characteristics of the same, and anyone constructing an aeronautical propeller of any type and using materials specified would invade the monopoly which they are intended to express.

We are of the opinion that these claims express no patentable invention. Prior to August 30, 1921, the date of the inventions embodied in these claims, it was known and had been suggested to those skilled in the art of propeller construction and design that aluminum and forged alloys of aluminum, such as duralumin, because of their strength and lightness, were satisfactory building materials for aeronautical propellers, and the physical characteristics of these materials were well known and published prior to this date.

The various prior art publications which refer to the use of duralumin and forged alloys of aluminum for propeller construction are referred to in detail in Findings 52–58 inclusive, and it is unnecessary to again set forth all of them

in detail. We, however, make specific reference to a German publication, "Luftschrauben," published in 1912 (Finding 52), in order to better answer plaintiff's argument with respect to the material claims. This publication is an article entitled "Book of Instruction for the Construction and Treatment of Propellers" and discloses the stresses upon the blades of aeronautical propellers with reference both to centrifugal force and the deflecting moment of the thrust. The article also suggests that aluminum may be employed for the blades of a propeller, this being utilized by means of forming dies. The article sets forth a table of strength values for propeller materials, which includes pure aluminum, aluminum alloys, and duralumin sheet, forgings and pressings.

Plaintiff urges that this prior publication merely suggests duralumin as a material and does not instruct those skilled in the art how to construct a propeller of this material. The answer to this is found in the successful flight operation of the Bastow aluminum aeronautical propeller in 1910 at Pawtucket, Rhode Island, the details of which are set forth in Finding 60. With workmen sufficiently skilled in the art in 1910 to successfully construct and operate an all-metal propeller having aluminum blades and with the numerous formulae directed to propeller design and propeller characteristics, it would be but a step in degree and within the knowledge of the propeller designer to construct a propeller of aluminum alloy or alloy forgings once the suggestion of its use for this purpose has been made, and the strength and weight characteristics of the alloy are known.

Cases too numerous to cite indicate that it is within the skill of the trained workman to do many things. He may reduce weight; he may increase the size of parts; he may make parts stronger by the substitution of one familiar material for another; he may make them lighter or heavier, or he may divide one part into two, or combine two parts into one.

Plaintiff further urges that a presumption of patentability should be based on the fact that the metal propeller did not come into successful and normal use until after the Reed inventions. Such a presumption sometimes has a controlling influence, but this is only true when the question of invention

is difficult to determine, and in the present case the factors are such that we do not invoke this presumption as a helpful factor. General acceptance and usage of an article depend upon many things, and from our study of the prior art it is apparent that the aeronautical industry was moving rapidly toward the adoption of the metal propeller, irrespective of the Reed patents.[1] New articles with the latest improvements in general supersede older ones as an industry develops, and there exists among those skilled in an art a tendency to carry forward and improve machines and processes. Also, in many instances an article comes into wide use from being placed upon the market by energetic manufacturers with strong financial backing. All these factors tend to offset any presumption due to commercial adoption.

For these reasons we are of the opinion that claims 11, 12, and 13 express no patentable invention, and are therefore invalid.

The petition is accordingly dismissed.

It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

CALLAHAN WALKER CONSTRUCTION COMPANY v. THE UNITED STATES

[No. 43102. Decided January 5, 1942]*

On the Proofs

Government contract; decision of contracting officer confined to questions of fact.—Where the plaintiff entered into a written contract with the defendant for performing a certain amount of earth work on the construction of a Mississippi River levee, according to specifications; and where after the work provided for in the contract had been nearly completed the contracting officer for defendant issued an order for additional work and stated in the order that "payment for additional yardage made necessary would be made at the contract price per yard;" and

[1] *The Cuno Engineering Corporation* v. *The Automatic Devices Corporation*, decided by the Supreme Court November 10, 1941. (314 U. S. 84)

*Defendant's petition for writ of certiorari granted by the Supreme Court May 11, 1942.

where the contract provided that if any changes were made in the contract an equitable adjustment should be made, which provision of the contract was disregarded by the contracting officer; it is *held*—

1. That the defendant made no adjustment of plaintiff's claim and thereby breached the contract.

2. That the determination of what is an equitable adjustment is one of law and the contracting officer, authorized by the contract to pass only on questions of fact, had no authority to pass on said question of law.

3. That the decision of the contracting officer in his order that "payment for additional yardage will be made at contract price per cubic yard" was that the contract price applied to the additional work and that this was not in any sense a decision upon a fact but it was in effect a conclusion of law.

4. That, the defendant having breached the contract by the refusal of the contracting officer to make any adjustment, the plaintiff could bring suit without taking any appeal, as the contract provisions for appeal applied only to the decisions of the contracting officer on questions of fact; there was no adjustment from which to take an appeal.

Same; implied contract.—An implied contract arose to pay the plaintiff the reasonable value of the extra work performed.

Same; agreement with subcontractor.—The agreement, as to the extra work, between the plaintiff and its subcontractor had no bearing upon the contract between the plaintiff and the defendant.

Same.—Where extra work is ordered by the proper officer of the Government, such extra work being necessary, and where it is accepted and used by the Government the Court of Claims has held that there is an implied contract to pay the contractor the reasonable value thereof unless there is a provision in the contract directly forbidding payment in the circumstances of the case. *United States* v. *Spearin*, 51 C. Cls. 155; affirmed, 248 U. S. 132, 139, cited.

Same.—The question whether an equitable adjustment is made is for the court to decide.

The Reporter's statement of the case:

Mr. Robert A. Littleton for the plaintiff. *Mason, Spalding & McAtee* were on the briefs.

Mr. William A. Stern, II, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiff and defendant entered into a written contract dated August 27, 1931, whereby, for a consideration

of 14.43 cents per cubic yard plaintiff agreed to furnish all labor and materials, and perform all work required for constructing "about 3,881,600 cubic yards of earthwork" as described in paragraph 39.2 of Specifications No. 32/30, attached to the contract and made part thereof. Map, file No. 53/72, was also attached to and made part of the contract. The work was to be commenced within 20 calendar days after the date of receipt of notice to proceed and be completed within 460 calendar days from that date. The officer contracting for the United States was T. B. Larkin, Major, Corps of Engineers, District Engineer.

Copy of the contract, with the specifications and map, is filed in evidence and made part hereof by reference.

The plaintiff received from the contracting officer notice, September 1, 1931, to proceed with the work, reading as follows:

> You are hereby notified to proceed with work under your contract symbol number W eleven naught six engineer fourteen ninety one dated August twenty seven nineteen thirty one. Stop. Contract papers being mailed. Stop. Acknowledge.

The plaintiff had previously, August 25, 1931, been notified by the contracting officer that its bid on Lake Lee Setback items A to D inclusive had been accepted.

This fixed the date for completion of the work December 4, 1932.

2. Plaintiff's work was described in the specifications under Article 39.2. Among other things the contract provided:

> (b) *Borrow Pits:* The material for the work shall be obtained from riverside borrow pits in accordance with paragraph 25 of these specifications, except that the bottom of the pits may be excavated on slopes steeper than 1 on 50, but not steeper than 1 on 25; and from existing levee where so indicated on map.
>
> (d) *False Berm:* A false berm, 100 feet wide landside and 100 feet wide riverside, measured from the toes of the levee, shall be built between Station 5116+46 and Station 5119. False berm shall have level crown at grade of 118.0 ft. M. G. L. (Net) with side slopes of 1 on 2 from edges of crown to natural surface.

3. Immediately after the opening of bids plaintiff notified the contracting officer by letter dated August 19, 1931, as to its equipment, as follows:

> It is proposed to build this work with one new Bucyrus electric tower with a twelve-yard bucket, 130-foot headmast, 50-foot tail tower, and one 6150 Monaghan dragline with a 160-foot boom and a seven-cubic-yard bucket. We are promised delivery on the electric tower September 25th, and we figure we will be ready to start work by November 1st. The 6150 dragline has three months work to do in the Memphis District, making it available for this work December the first. In addition to this we will have two small one and one-half cubic yard draglines with 50-foot booms to do miscellaneous work.

4. The location of the work was alongside Lake Lee, which was a loop abandoned by the Mississippi River. The levee to be constructed was on the Mississippi State side of the river, near Wayside, and was to be set back landward a short distance from an existing levee, the earth from which was in places to be used in constructing the new levee.

In usual Mississippi River levee construction earth is obtained from land between river and levee. Setting the new levee back to the landside of the old levee made more material available on the riverside of the new levee. So-called "rights-of-way" were procured by the Government from which to excavate material for the new levee, additional to that which might be utilized from the old levee.

The stretch of levee particularly here in controversy is from station 5113 to station 5123, a distance of 1,000 feet. That part of the old levee which was alongside this particular stretch of new levee was available in its entirety for the new work. This thousand-foot section was part of Subproject Item 495L–A, sometimes referred to as "Item A," extending from station 5081+28 to station 5146, the cubic yardage of which was estimated in the specifications as New Levee 954,250 cubic yards, average height 27 feet, and Berm 22,750 cubic yards, total 977,000 cubic yards. The specifications provided that a false, that is to say, an artificial berm 100 feet wide landside and 100 feet wide riverside, should be built between station 5116+46 and station 5119,

with a level crown at grade of 118 feet mean gulf level (net) with side slopes of 1 on 2 from edges of crown to natural surface.

5. During the progress of the work difficulty was expeienced in building the levee to the required height due to persistent subsidence. This situation was especially troublesome between stations 5123 and 5136.

As the levee subsided the surface in the riverside borrow pits correspondingly arose.

The plaintiff had begun work at the southern end, station 5336+54.5 and was working northward toward the north end, station 5081+28. Trouble with foundation failure had been first encountered at about station 5146, but the levee therefrom to station 5123, had been accepted for grade and section and from 5123 to 5113 had been about 68% completed when the contracting officer, being concerned over foundation failures and subsidences met with south of station 5123, ordered the plaintiff on October 7, 1932, to stop work at or about station 5123, proceed to station 5113 and work northward therefrom, omitting work from 5113 to 5123 for the time being. His purpose in doing this was to give him time to investigate and determine upon measures that would forestall subsidence between stations 5113 and 5123.

6. The plaintiff complied with the contracting officer's order of October 7, 1932, and proceeded to station 5113.

The contracting officer considered the situation between stations 5113 and 5123 and on October 18, 1932, issued the following order to the plaintiff, against plaintiff's objections that no extra price was allowed and that it was not within the contract terms, and with oral notice to the contracting officer that plaintiff would later assert a claim for extra costs occasioned by the change in work:

> In reference to recent subsidence which occurred on your Lake Lee Setback, Item A, this will confirm instructions issued to you by the Central Area Engineer relative to the completion of your contract, as follows: (a) A riverside false berm will be constructed from station 5113 to station 5123 having a riverside crown elevation of 120 ft. M. G. L. at a distance of 250 feet from the centerline and sloping upward toward the

levee on a 1 on 18 slope and downward to the ground surface on a slope of 1 on 6.

(b) The above berm shall be completed before doing any further work between stations 5113 and 5123.

(c) You will be given credit for 100% of the embankment south of station 5123.

(d) If and when directed by the contracting officer, the levee between stations 5123 and 5146 shall be sodded.

(e) Payment for additional yardage made necessary by the above instructions will be made at contract price per cubic yard.

The additional work so ordered by the contracting officer was necessary for the completion of the project.

Article 3 of the contract reads as follows:

> ARTICLE 3. *Changes*.—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

Article 15 reads as follows:

> ARTICLE 15. *Disputes*.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

7. Plaintiff's bid was in part based upon the use of towers. One tower, called the "head tower," is placed on the levee site, and the other tower, called the "tail tower," is placed where the earth is to be obtained for the levee. A cable reaches from the tail to the head tower and the excavating shovel at the tail tower scoops up the earth and travels on the cable to the head tower, where it is deposited at will. Each tower is placed where its operating radius is most effective.

The use of towers does away with the necessity of trucking or drifting all the earth in from borrow pit to embankment or rehandling the same by relays of excavating equipment.

Under the original plans plaintiff would have had to drift in some material to its tail tower, due to the lack of sufficient suitable material directly in front of the new levee.

The enlargement of the riverside false berm required under the order of October 18, 1932, necessitated plaintiff's hauling or drifting in additional material to bring it within reach of the tail tower, over that required in the construction of the originally required work. Suitable material did not extend in depth to more than two or three feet in the borrow-pit area, and the territory possible of excavation for levee material, under the revised plan, was extended beyond the limits contemplated by the contract.

The landside berm, stations 5113 to 5123, was constructed by Government forces, the plaintiff being relieved of the work thereon required by the contract.

The plaintiff built the enlarged riverside berm, stations 5113 to 5123, under protest that no extra price was allowed and, in doing the work, demanded, and has ever since demanded, of the defendant extra costs entailed by the enlargement.

8. Plaintiff completed within the contract time all work required by the contracting officer.

On Item A plaintiff placed 878,617 cubic yards of levee embankment for which it was paid $126,784.43; 68,274 cubic yards of riverside false berm between stations 5113 and 5123, under the order of October 18, 1932, for which it was paid $9,851.94; and 18,945 cubic yards of false berm prior thereto

for which it was paid $2,733.77, all at the rate of 14.43 cents per cubic yard, totals of $139,370.14 and 965,836 cubic yards.

The following table shows the cubic yardage of Items A, B, C, and D (1) as estimated in Article 39.2 of the specifications and (2) as actually laid down:

Item	Estimated (1)	Placed (2)
A Levee	954, 250	878, 617
A Berm	22, 750	87, 219
B Levee	937, 300	841, 045
B Blue Hole	29, 500	28, 754
C Levee	972, 300	906, 252
D Levee	965, 500	962, 209
Totals	3, 881, 600	3, 704, 096

Plaintiff was required to place and in fact placed 177,504 cubic yards less than estimated in the specifications, and has been paid for the cubic yardage of 3,704,096 the sum of $534,501.07 at the rate of 14.43 cents per cubic yard.

The last payment made to the plaintiff was $13,937.01, being percentages retained on Item A. The plaintiff endorsed the voucher for the amount: "Signed under protest as to additional payment due for extra work performed by us due to subsidence Item A."

9. The embankment to the south of station 5123, referred to in the contracting officer's order of October 18, 1932 (finding 6), had been completed by the plaintiff to the required grade, but had not been dressed or sodded between stations 5123 and 5139. After being brought to grade the embankment subsided causing cracks to be opened up therein. This subsidence occurred on or about the night of October 6–7, 1932. Fearful that rain would wash down the cracks and aggravate foundation trouble, the contracting officer's representative ordered the plaintiff on or about October 11, 1932, to dress this section, stations 5123 to 5139, which was a levelling-off process preliminary to sodding, and this dressing was done by the plaintiff in three days of 12 hours each, between October 11 and 14, 1932. Thereafter plaintiff was relieved of sodding this section, and it was not sodded by the plaintiff.

Plaintiff used a Northwest dragline and bulldozers in dressing the section.

10. Plaintiff does not include in its claim handling of material by its tower machine. In constructing the enlarged riverside false berm plaintiff caused other equipment to be used in drifting in material to the berm or placing it within reach of the tail tower, an operation much of which would not have been necessary had the riverside false berm been confined to its original dimensions, and required the use of additional machinery furnished by a subcontractor as shown in the next paragraph. This work done by the subcontractor was not contemplated or required under the original contract.

This drifting or hauling in of the material was done by a subcontractor or the plaintiff and amounted to 45,895 cubic yards. For this work the plaintiff paid to the subcontractor, at the contract rate of 14.43 cents per cubic yard, $6,622.65. The agreement between plaintiff and the subcontractor provided that in the event that plaintiff was unsuccessful in its claim against the United States for compensation over and above the rate of 14.43 cents per cubic yard for the material so hauled by the subcontractor, the subcontractor would receive no more than 14.43 cents per cubic yard, but that if the claim was allowed the subcontractor would receive more than 14.43 cents per cubic yard.

The work of this subcontractor did not include the dressing and sodding of the enlarged false berm. The sodding and dressing was done directly by the plaintiff at a fair and reasonable cost to it of $1,453.30. This is the cost of dressing and sodding the entire berm as constructed and there is no proof as to the excess over the probable cost of the originally designed berm.

11. The Government constructed the landside berm at stations 5113 to 5123 with its own forces, calling upon the plaintiff to construct the enlarged riverside berm on the other side of the levee. Plaintiff could not top out the levee stations 5113 to 5123 until both these berms were built. The tower machine had been moved up north of station 5113 in accordance with the contracting officer's order of October 7, 1932, and after accomplishing its mission tracked back to station 5113 October 28, 1932, ready to top out the levee

stations 5113 to 5123. At that time plaintiff had not completed the enlarged riverside berm and the Government forces had not completed the landside berm.

The landside berm was completed before the riverside berm.

Working with and auxiliary to the tower machine was a 3-W Monaghan dragline, and this was idle whenever the tower machine was idle.

There is no satisfactory proof that plaintiff suffered any damage through the Government's operations in constructing the landside berm stations 5113 to 5123.

12. On December 28, 1932, the plaintiff filed a claim with the contracting officer for $16,952.79. The items included therein relevant to the items here sued on, are summarized therein as follows, 10 percent being added to the total "for use of tools and general supervision."

Item A. Building riverside false berm. Oct. 15th to 29th, inclusive, between stations 5113 and 5123, with Caterpillar tractors, wagons, and two 1¾ cu. yd. line loading wagons:		
2,290 Cat wagon hours at $4.50 per hr	$10, 305. 00	
599 Dragline hours at $6.75 per hr	4, 043. 25	
	14, 348. 25	
Less 45,895 cu. yds. which was allowed on estimate at .1443 per cu. yd	6, 622. 65	
Balance due		$7, 725. 60
Item D. Rehandling earth with our 7½ cu. yd. 160′ boom Monaghan dragline due to dirt being borrowed from pits by tractor units building riverside false berm:		
116 machine hours from Oct. 31st to Nov. 5th, inclusive		4, 390. 45
Item E. Filling cracks and depressions in subsided levee with NW 1¾ cu. yd. dragline; also A. C. Bulldozer between stations 5123 and 5146, Oct. 11th to Oct. 14th, inclusive:		
Dragline, 36 hrs. at $6.75 per hour	$256. 50	
Bulldozer, 36 hrs. at $4.50 per hour	162. 00	
		418. 50
Item F. Labor dressing riverside false berm:		
NW 1¾ cu. yd. dragline, 44 hrs. at $6.75	$297. 00	
Labor and Bulldozer operation	645. 55	
		942. 55

This claim has not been paid in whole or in part.

There is no dispute between the parties as to the time required by the subcontractor for doing the work described in

Item A and Item D of this bill and the evidence shows that the price stated as the value of the use of the equipment and the work done by it as shown in these two items was reasonable and fair. The Monaghan dragline used was of more than usual capacity.

The proof fails to show that Item E included work not contemplated by the original contract and Item F is excluded under the last sentence of Finding 10.

The evidence shows that ten percent of the value of the equipment used as shown in Items A and D was a reasonable and customary charge for the use of tools and supervision in connection with the work so done.

The court decided that the plaintiff was entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

It appears that the plaintiff entered into a written contract with the defendant for performing a certain amount of earth work according to specifications attached, this work being in the construction of a levee.

After the work provided for in the contract had been nearly completed, the contracting officer of defendant issued an order for the construction of a riverside false berm as described in finding 6, and stated in the order that "payment for additional yardage made necessary would be made at the contract price per yard." This additional work ordered was not contemplated or required under the original contract, but the plaintiff was paid for the work only in accordance with the yardage price stated therein. It now brings suit to recover the additional cost of this work over and above the contract price.

The order made by the contracting officer unquestionably changed the contract and increased the amount due under it. The work was necessary for the completion of the project and within the general scope thereof and the contract provided for changes being made but Article 3 (see finding 6) provided that "If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accord-

ingly." The contracting officer paid no attention to the provision quoted above but required the plaintiff to perform the work in accordance with his order, although the change made a large increase in the amount due under the contract.

This we think was clearly a breach of the contract. As against this conclusion it is argued that Article 3 provided that "no change involving an estimated increase or decrease of more than $500 shall be ordered unless approved in writing by the head of the department or his duly authorized representative."

It is said that this provision was not complied with, but the contracting officer who made the contract and the order for additional work was the "duly authorized representative" of the department and has so been treated in all of our decisions. As he ordered the change he must have approved it. It is also said that the plaintiff was not obliged to comply with the order if it was unauthorized but the order was authorized and the contract required the contractor to immediately proceed with the work in accordance with the order. It is quite evident that the order of the contracting officer fixing the contract price as a rate of payment for this additional work was not an "adjustment" required by Article 3. An *"adjustment" is a change to meet changed conditions.* Here no change was made although the findings show clearly changed conditions which made the additional work more costly not merely in quantity but per yard. In view of this fact, it is clear that it was not an "equitable adjustment" for no allowance whatever was made to the plaintiff on account of the additional cost per yard. Moreover the reading of the order shows that the contracting officer was not making any attempt at adjustment or any pretense thereof. He simply held that the contract rate applied to the additional work done. Here we have a case where the contracting officer not only refused to make an equitable adjustment but no adjustment whatever was made and certainly not an equitable adjustment. This was a breach of Article 3, and by reason of this breach, the defendant was not entitled to any benefit from the remaining provisions of this article. As the case stands, it is merely one in which the defendant's agent ordered additional earth moved above that required by the contract. The

findings show that this earth was so located that the cost of moving it would be much increased over the yardage price stated in the original contract.

It is especially urged, however, in the dissenting opinion that Article 15 provided that all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to appeal by the contractor. It is argued that there was a dispute of fact involved in the order of the contracting officer and that when he stated that the plaintiff would be paid for the additional work at the contract rate, he was in effect saying that this was the reasonable value of the additional work ordered and that this was a question of fact which he had the power to decide.

We think it has been shown above that he was not deciding a question of fact and that his order cannot be so construed. He did, in effect, assert that the contract rate applied to the additional work ordered but this involved a question of law which he had no authority to decide. We have also held above that he not only did not make an equitable adjustment but made no adjustment whatever.

Where extra work is ordered by the proper officer which is necessary and it is accepted and used by the defendant we have held that there is an implied contract to pay the contractor the reasonable value thereof unless there is a provision in the contract directly forbidding payment under the circumstances of the case. The general provisions with reference to the naval contracts do not prevent the application of this rule, and it was held in *United States* v. *Spearin*, 248 U. S. 132, 139, that neither 3744 of the Revised Statutes, which provides that contracts of the Navy Department shall be reduced to writing, nor the parol evidence rule, precludes reliance upon a warranty implied by law. See *Kellogg Bridge Co.* v. *Hamilton*, 110 U. S. 108. *United States* v. *Spearin*, *supra.*

It is difficult to find any case where the precise question involved in this case was discussed at length, although the controlling principles have been decided. It has been held heretofore in effect that the provision for equitable adjustment where a change was made in the contract which increased either the quantity or the expense of the work was

a peremptory requirement and must be followed. The reason for this assumption is manifest, for if it were not an absolute requirement but left to the opinion or judgment of the contracting officer, it would be no protection whatever to the plaintiff and would permit the taking of plaintiff's work without compensation.

As no adjustment was made of the additional cost, the plaintiff under all of the authorities was not obliged to take an appeal or even to protest and without an appeal could bring suit to recover on an implied contract the reasonable value of the work. The plaintiff, however, did protest against the decision of the contracting officer that payment would be made under the contract rate.

It should be observed in this connection that even if the contracting officer was intending to make an equitable adjustment of the price per yard (we think it is clear that he did not) this was not a matter upon which he was authorized to make a final decision. The Supreme Court has held in two cases that the question of what is an equitable adjustment is not one of fact but one of law. See *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, 114, 115, 119, and *Securities Commission* v. *U. S. Realty Co.*, 310 U. S. 434, 452.

The question of whether an equitable adjustment was made would therefore in any event be one for this court to decide regardless of the form of the order of the contracting officer; and we have held above not only that the order was not an equitable adjustment but that there was no adjustment whatever.

Although cases exactly similar on the facts cannot be cited, the case of the *United States* v. *Smith*, 256 U. S. 11, 16, involves a similar question. In that case, the specifications provide that the decision of the engineer officer in charge as to quality and quantity of the work was final, and that his instructions were required to be observed by the contractor. The contract further required that modifications of the work in character and quality, whether of labor or material, were to be agreed to in writing and unless so agreed to or expressly required in writing no claim should be made therefor.

After part of the excavation had been made, it appeared that the material to be moved was of a very different quality

from that stated in the specifications of the contract much more difficult and costly to be excavated. The plaintiff then claimed to be entitled to receive more for the work and an extra price for the reason that the quality of the excavation made it more difficult and costly than that specified in the specifications. His request for an extra price was refused and he was told if he did not proceed he would be regarded as in default. The evidence showed without controversy that the material was much more difficult to excavate than that described in the contract. A defense was set up based upon the provisions of the contract set out above but the Supreme Court said that this defense overlooked the uselessness of soliciting or expecting any change to be made by the contracting officer and that the right of the plaintiff "to recover the price for the work done is indisputable." In the case cited, the contracting officer was authorized to decide whether the quality of the work was such as to require a higher price but it was said that the action of the contracting officer was contrary to the provisions of the contract with reference to the material to be excavated. In the case before us, the new work to be done was also outside of the provisions of the contract and the refusal by the contracting officer to comply with the provisions of the contract with reference to its modifications rendered no appeal necessary.

The circumstances of the case before us are the same as in the *Smith case*, *supra*. The findings show that when the order was made, the plaintiff objected thereto on the ground that it was not within the contract terms and gave notice to the contracting officer that it would later assert a claim for extra costs occasioned by the change in the work, thus complying with the conditions of the contract. But as the contracting officer would not consider the plaintiff's claim or make any adjustment, it was not necessary that the plaintiff should take an appeal. The breach of the contract was complete when the contracting officer paid no attention to the objections and protests of the plaintiff against the order and refused to make any adjustment. Moreover the conduct of the contracting officer in refusing to consider plaintiff's repeated protests showed the uselessness "of expecting any change from him."

In the case of *Rust Engineering Company*, 86 C. Cls. 461, 476, 477, the contracting officer required the contractor to furnish a different and more expensive tile than was required by the contract and this court said that he thus obligated the defendant to pay the excess costs of the special tile, and that this action constituted a change in the contract which "required an equitable adjustment in the contract price by reason of the increased cost." Although the contract was exactly similar to the one in the case which we have before us and no appeal was taken from this order, the court held the defendant liable for the additional cost which plaintiff was required to pay for the tile demanded. The court said that this was not a dispute concerning a question of fact but one with reference to the construction of the contract, as the evidence showed without dispute that the tile was more expensive and presented the question as to whether under the provisions of the contract the plaintiff should be required to furnish a more expensive tile than the one desired and known to the trade and the parties at the time the contract was made. The court also held that the decision not being one of fact but a construction of the contract, no appeal was necessary. In the case before us the plaintiff was required to do work more costly in its operations than that required by the original contract. The two cases appear to be exactly parallel so far as the matters to which we have referred are concerned.

In the case of *Callahan Construction Co.* v. *United States*, 91 C. Cls. 538, 611, a somewhat similar contract case in which the plaintiff claimed to be entitled "to be paid for the extra expenses incurred by reason of being required to perform certain specified units of work in a manner different from and more expensive than that contemplated and specified in the contract and specifications," the court said:

> Where an instrument, especially one of such character as is involved in this suit, is drafted and prepared entirely by one party thereto, and is specific in its detailed requirements, subsequent doubts as to the meaning and applicability of the language and provisions thereof, to definite facts, conditions, situations, and circumstances should not be interpreted and construed in favor of the party who drafted and prepared it, but, on the con-

trary, in such cases the provisions of such instrument should, in case of doubt and in such circumstances, be interpreted more favorably to the other party who did not and could not, in the circumstances, have anything to say as to the language and provisions of the instrument as prepared.

We do not think any doubt arises in the case but if there be any, we think that in fairness, justice, and the manifest understanding of the parties the rule laid down above would be applicable.

No finding is made that the decision of the contracting officer that the additional work should be paid for at the contract price was arbitrary or capricious and this is presented as one of the reasons why his decision should be held final. We had no occasion to make such a finding. On the contrary, construing the language used by the officer in his order as a matter of law, we hold that he was not deciding a fact but merely issuing an order that the contract rates be applied to the extra work done probably in the belief that the contract authorized him so to do. This being merely his opinion, on the construction of the contract, could hardly be held to be arbitrary or capricious. It was rather a mistake in judgment, but in any event he had no authority to construe the contract.

For the reasons stated, our conclusions are:

1. That the defendant made no adjustment of plaintiff's claim and thereby breached the contract;

2. That the determination of what is an equitable adjustment is one of law and the contracting officer who could only pass on questions of fact had no authority to decide it;

3. That the plain meaning of the language used by the contracting officer in his order that "Payment for additional yardage * * * will be made at contract price per cubic yard" was that the contract price applied to the additional work, and that this was not in any sense a decision upon a fact but it was in effect a conclusion of law;

4. That the defendant having breached the contract by the refusal of the contracting officer to make any adjustment, the plaintiff could bring suit without taking any appeal, as the provisions for appeal applied only to the decisions of the

contracting officer on questions of fact. Moreover there was no adjustment from which to take an appeal.

What we have said above shows that an implied contract arose to pay the plaintiff the reasonable value of the extra work so performed. The defendant, however, objects to this conclusion and says that the plaintiff has sustained no damage because it has only paid the subcontractor at the contract rate of 14.43 cents per cubic yard which has been paid to plaintiff by defendant and that "The agreement between plaintiff and the subcontractor provided that in the event that plaintiff was unsuccessful in its claim against the United States for compensation over and above the rate of 14.43 cents per cubic yard for the material so hauled by the subcontractor, the subcontractor would receive no more than 14.43 cents per cubic yard, but that if the claim was allowed the subcontractor would receive more than 14.43 cents per cubic yard," (see finding 10), that by reason of this agreement the plaintiff has sustained no damage and is not entitled to recover anything above the contract price for the extra work done.

We do not think that the agreement between plaintiff and its subcontractor is any defense. The defendant's liability was contractual. Its implied agreement was to pay the reasonable value of the extra work and if the subcontractor had agreed with plaintiff to do the work for nothing we do not think it would have invalidated this agreement. Certainly it would not have followed that the plaintiff could get nothing for this work from the defendant. The implied contract between defendant and plaintiff and the contract between plaintiff and the subcontractor are two entirely separate contracts, and in our opinion the latter had no effect on the obligations of the former.

At the time the change order was made, the plaintiff protested against it and notified the contracting officer it would ask for additional pay; and when it was paid at only the contract rate, it again protested and filed an itemized claim for additional work with the contracting officer amounting to $16,952.79 (see finding 12) for which it now asks judgment. We do not think the plaintiff is entitled to recover for Items E and F set out in finding 12 but hold that it is entitled to

recover for Items A and D which are for the extra work required. The charges in this bill are not made up by the number of cubic yards moved but in accordance with the value of the use of equipment used by the subcontractor in completing the work and the defendant is given credit for the payment which it made on the yardage removed. There is no dispute between the parties as to the time required by the subcontractor for doing the work described in Items A and D and we find the value stated in the bill to have been reasonable and fair also that ten percent in addition for the use of tools and supervision was a reasonable and customary charge. The value of the subcontractor's work and equipment included in Item A was $14,348.25, under Item D $4,390.45, making a total of $18,738.70; 10% on this would amount to $1,873.87 and added to the value of the work makes a total of $20,612.57. From this should be deducted the $6,622.65 which defendant paid thereon, leaving a balance of $13,989.92 for which the plaintiff is entitled to judgment.

It is so ordered.

WHALEY, *Chief Justice*, concurs.

WHITAKER, *Judge*, concurring:

I concur in the foregoing decision for this reason, briefly expressed: The contract provided in article 3 that if changes were made bringing about an increase or decrease in the amount due under the contract "an equitable adjustment shall be made." Under the authority of *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, cited in the foregoing opinion, and other cases, what constitutes an equitable adjustment is clearly a question of law. (See pages 113, 114, 115, 118 and 119 of that opinion.) I think articles 3 and 15 gave no authority to the contracting officer nor to the head of the department to decide such questions.

Article 3 provides, "if the parties cannot agree upon the adjustment the dispute shall be determined as provided in article 15 hereof." But article 15 confers on the contracting officer and the head of the department the right to decide disputes only as to questions of fact. Hence, when a dispute arose under article 3 and the parties were unable to agree, it

was necessary to take an appeal to the head of the department only on the questions of fact involved in the dispute.

There is no dispute between the parties in this case as to the facts. The only dispute concerns whether or not the amount allowed by the contracting officer for the extra work constituted an equitable adjustment, and this, as the majority opinion holds, is a question of law. Neither the contracting officer nor the head of the department was given any right by the contract to decide such questions. If, therefore, the plaintiff did not think the adjustment made by the contracting officer was equitable, it had a right to appeal to this court for relief. The relief granted by the court is the relief to which I think the plaintiff is entitled.

MADDEN, *Judge*, dissenting:

I do not agree with the opinion of the majority.

The contracting officer here concluded, because the new levee in adjacent locations had subsided, that additional support should be given to the levee to be built by plaintiff. He thereupon advised plaintiff some days before October 18, 1932, that the false berm to be erected between the levee and the river was to be enlarged beyond its dimensions as they were stated in the specifications. Plaintiff protested doing this work, saying that it was not necessary; that earth to form the additional berm was not within reach and that additional equipment would be required; that the price per yard of earth moved should be more than 14.43 cents per cubic yard provided in the contract. The contracting officer, however, on October 18, 1932, issued his order in writing that the additional work be done, and at the price per yard specified in the contract.

Here we have the situation contemplated in Article 3 of the contract (see finding 6). The contracting officer made a written change order and specified the price which plaintiff should receive for doing the additional work. The change had already been discussed orally and plaintiff had made clear its position that it considered the price too low. That protest was in the mind of the contracting officer when he set the price. Plaintiff made no claim for adjustment

within ten days after the written change order was made, as Article 3 required, but that is probably immaterial, as the matter had been orally discussed before the written change order was issued, and the contracting officer was aware of plaintiff's position. Both plaintiff's claim for adjustment and the contracting officer's adjustment therefore preceded the written order, but as indicated above, I think that is probably immaterial and I would not rest the decision upon the fact that plaintiff presented no further claim to the contracting officer within ten days after receiving the change order as provided in Article 3 of the contract.

Article 3 further provides that after these steps have been taken "if the parties cannot agree upon the adjustment, the dispute shall be determined as provided in Article 15 hereof." And Article 15 is as follows:

> ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall proceed diligently with the work as directed.

Plaintiff did not appeal to the head of the department as the contract required. In plaintiff's reply brief it argues that this failure was a "pure technicality" which should not defeat its claim.

I do not think that plaintiff can transfer its claim from the forum in which it expressly agreed that such dispute should be decided to this court, merely by neglecting or refusing to present its claim in the agreed forum. *Silas Mason Co.* v. *United States*, 90 C. Cls. 266; *Fitzgibbon* v. *United States*, 52 C. Cls. 164; *Jacob Schlesinger, Inc.* v. *United States*, 94 C. Cls. 289. If it had exhausted its remedy there, and this court were of the opinion that the treatment there accorded it was "fraudulent" or "so grossly erroneous as to imply bad faith" (*Sweeney* v. *United States*, 109 U. S. 618, 620; *Silas Mason Co.* v. *United States*, *supra*, at 275; *G. F.*

Pawling Co. v. *United States*, 60 C. Cls. 699, 712), relief would be available here. But where the agreed remedy has not even been pursued, there can be no assumption that relief would not have been obtained, if sought.

We do not have here a situation like that in *Smith* v. *United States*, 256 U. S. 11. There the conduct of the contracting officer, whose decision was, according to the contract, to be final, was described by the Supreme Court as "repellant of appeal or of any alternative but submission with its consequences." There the engineer officer required the contractor to excavate for 18 cents a yard material like that for which $2.24 a yard was paid under another contract. Here there is no showing of arbitrary or threatening conduct on the part of the contracting officer, and the final authority, the head of the department, was not appealed to at all. Here the contracting officer's decision as to the price was near enough to being right so that the plaintiff's subcontractor was willing to agree to do the work for that price, if it turned out to be all that plaintiff received from the Government.

One basis for the opinion of the majority, and the sole basis for the concurring opinion, is the conclusion that plaintiff was not obliged to appeal its disagreement with the contracting officer to the head of the department because that dispute concerned a question of law rather than a question of fact. I do not understand why the question whether fair compensation for moving earth from one place to another is 14.43 cents per yard, or some other number of cents, is a question of law. It would be a question for the jury in any suit where trial by jury was had. The language of the Supreme Court of the United States in *Case* v. *Los Angeles Lumber Company*, 308 U. S. 106, is relied upon in the majority and concurring opinions. By the terms of Section 77B of the Bankruptcy Act, 48 Stat. 911, 912, the question of what constituted a "fair and equitable plan" was to be decided by the court and not by various percentages of the security holders, and the Supreme Court so held. That opinion seems to me to use the phrase "question of law" merely as a short hand expression, meaning, as the court held,

that the question was one for the court under the statute. The *Case* decision does not therefore seem to me to be helpful in our case.

For the reason that plaintiff did not pursue the remedy which, in the contract, it agreed to pursue and abide by, I would dismiss its petition.

JONES, *Judge*, concurs in this opinion.

LOUISE HARDWICK, ADMINISTRATRIX OF THE ESTATE OF WALTER S. HARDWICK, DECEASED, v. THE UNITED STATES

[No. 43428. Decided January 5, 1942]

On the Proofs

Government contract; extra work not ordered by contracting officer.—Where it was provided in the contract on which the instant suit is brought that "no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order;" and where it is shown by the evidence adduced that not only the work in question was not ordered by the contracting officer but also plaintiff was informed that if done it would not be paid for; it is *held* that the plaintiff is not entitled to recover.

The Reporter's statement of the case:

Mr. Robert A. Littleton for the plaintiff. *Mason, Spalding & McAtee* was on the brief.

Mr. William A. Stern II, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiff is administratrix of the estate of Walter S. Hardwick, who died intestate January 14, 1936. The decedent, during the contract period here involved, was a member of the partnership of Erickson & Hardwick, which was composed of the decedent and Carl Erickson. Subsequent to the contract period Carl Erickson died and the partnership was dissolved, Walter S. Hardwick surviving.

2. On November 17, 1932, the aforesaid Carl Erickson and Walter S. Hardwick entered into a contract with the defendant, represented by J. N. Hodges, Lieut. Col., Corps of Engineers, U. S. Army, as contracting officer, whereby the contractor agreed, for the consideration of 12 cents per cubic yard, place measurement, to furnish all labor and materials, and perform all work required for the construction of Kempe-Lake St. John Levee, Relief Levee Item R-674-C, containing approximately 1,000,000 cubic yards; Relief Levee Item R-674-D, containing approximately 845,000 cubic yards; Relief Levee Item R-674-H, containing approximately 940,000 cubic yards, and Relief Levee Item R-674-I, containing approximately 800,000 cubic yards, all situated in the Lower Tensas Levee District, in accordance with designated specifications and drawings made a part of the contract.

The contract recited that: "Drawing showing soil borings for Relief Levee Items R-674, C, D, H, and I, not furnished with specifications, were furnished to all prospective bidders by circular letter dated October 5, 1932, as per copy attached to Specifications No. 33.133 forming a part hereof."

The complaint in this suit is concerned only with Relief Levee Item R-674-C, which extended from Station 3200+36 to Station 3370+00, and more specifically with the section between Stations 3219 and 3252, a distance of 3,300 feet. The work on Item R-674-C was enlargement of an existing levee to the riverside thereof, and the material was to be procured from land to the riverside of an old borrow pit, that was itself riverward of the existing levee, so that the old borrow pit was between the projected enlargement and the pit from which the material was to be excavated.

Paragraph 23 of the specifications provided among other things:

> 23. Borrow pits.—*General.*—The location of borrow pits will be designated in paragraph 34 for each item of work advertised. * * * In determining pit dimensions, the original natural surface of the ground at the site of the work shall be used instead of the surface of the old borrow pits. On enlargement work no material shall be taken from the old pits without special permission from the contracting officer. * * * Any

> excavation below the specified borrow pit slopes constitutes a violation of these specifications and shall be immediately refilled to the specified slope line plus 25 percent additional material for shrinkage.
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> * * * * *
>
> * * * No material shall be obtained within 40 feet of the base of the levee on the river side. * * *. The side slope of the pit next to the embankment shall not be steeper than 1 on 2 to a depth of 3 feet; from that point the outward slope of the pit shall not be steeper than 1 on 50 when on the river side of the levee. * * *

Paragraph 34 of the specifications provided that the riverside false berm should have a crown width of 40 feet, a crown slope away from the levee of 1 on 20, and a slide slope of 1 on 3. A false berm was a table extending from the toe of the levee and placed by artificial means, as distinguished from a natural berm whose surface was at natural ground level. The false berm served in part to counterbalance the weight of the levee embankment and in part to protect the levee embankment against erosion.

Article 5 of the contract provided that "no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order."

Copy of the contract, the specifications, and the drawings, including that showing soil borings, is filed in evidence and made part hereof by reference.

3. The work to be performed under the contract was sublet by the partnership to W. E. Callahan Construction Company with the approval of the United States. Compensation under the contract was paid to L. D. Crawford, attorney-in-fact for the partnership, and by him in turn paid over to W. E. Callahan Construction Co.

W. E. Callahan Construction Co. in turn sublet the work to Callahan-Walker Construction Co., which actually performed the work, and to which any amount recovered herein by the plaintiff will be paid over.

4. Those actually performing the work are referred to hereinafter as the "contractor."

The contractor used on the job a tower machine. This consisted of a head tower, placed on the landside slope of

the existing levee, a tail tower, placed at the point of excavation (the borrow pit), and intervening cables carrying a bucket which, when loaded at the tail tower, was dragged on the ground toward the head tower, and, when emptied on the embankment, was returned on an overhead cable to the tail tower, where it was again loaded. The capacity of the bucket was about a dozen cubic yards.

As to the section of levee here involved, Sections 3219 to 3252, the path taken by the bucket was across the old borrow pit. As it was dragged loaded toward the head tower some portion of its load would spill into the old borrow pit. The bucket was necessarily dragged over the surface again and again and in the process to a greater or less extent changed the contour thereof. There is no proof as to any definite amount of earth thus spilled by the bucket, but there was added by the contractor to this incidental spilling sufficient material to bring the old intervening borrow pit up to the same plane as the new borrow pit.

5. While the work was in progress Callahan-Walker Construction Co. communicated with the contracting officer January 25, 1933, as follows:

> We find that on the part of item (R 674 C) on which we are now working with our Tower Excavator, that due to our method of construction it is necessary for us to fill in between the false berm and the back of the existing pit in order to bring it up to the same plane as the new pit.
>
> It has been our policy so far to leave this material as placed so that it will serve as berm, and afford the pit perfect drainage, and make a neater looking job.
>
> We feel that we should receive some consideration for this work, and we will be very grateful if you can give this matter your attention and let us know your decision some time in the near future.

Callahan-Walker Construction Co. followed this up with another letter to the contracting officer February 8, 1933, as follows:

> On January 25th when we were working at station 3205 we wrote you that we were filling the old existing pits up to the plane of the new pits in order to give the pit perfect drainage and make a neater looking job.

We have continued this policy and placed approximately 25,000 cu. yds. in the old pits as we have proceeded with the work to station 3222 to date.

From station 3219 to station 3222 we have found very poor foundation for the levee and it has been necessary for us to keep our construction slopes down to less than 6 to 1 in order to prevent the foundation from puffing up ahead of the new fill not only in the old pit alone but part of the way up on the slope of the old levee. From the looks of the material dug from the inspection ditch and the borings we have taken, the foundation consists of a blue mucky material mixed with a very fine sand to quite a considerable depth as two men can push a 2″ auger straight down to a depth of 20 feet or more in some places. Every indication is that this condition will continue until we reach station 3251.

We have good material for the embankment and we have dug a ditch along the back of the existing pits for drainage and subdrainage of the foundation, but it is our honest opinion that this levee will not stand on this foundation if we discontinue filling the existing pits. In view of the conditions as outlined above we more than ever feel that we should receive some consideration for the filling of these pits as we stated in our letter of January 25th.

On March 24, 1933, the contracting officer made the following reply to Callahan-Walker Construction Co.:

Receipt of your letters dated January 25th and Feb. 8th, 1933, in which you request payment for refilling existing borrow pits between approximate stations 3219 and 3251 on Item R674C Kempe Lake St. John Levee is acknowledged.

In reply, you are advised that careful consideration has been given to your request and close examination has been made of the conditions surrounding the work. After review of the cross section and design of this work and visual examination of the construction operations, the following conditions are found:

(a) No evidence of foundation weakness or instability of cross section has been offered or could be found to indicate the desirability of any modification in design.

(b) Examination of completed levee, berm, and borrow pits shows that construction conditions are unusually good as a whole. The character of material available, and used in construction, is exceptionally good.

(c) Existing borrow pits and levee base are now apparently well drained, but should heavy rains become impounded in the construction area and levee construction be carried on under the resulting conditions, trouble may be anticipated, as would be the case elsewhere. The use of sound construction methods coupled with good drainage may be expected to result in the construction of a satisfactory levee, fulfilling the best interest of all concerned.

You are, therefore, informed that the design of this levee is considered adequate and satisfactory and unless sufficient reason is found for a change in design, none will be made. Any pit refill, beyond that provided for in the construction of false berm, placed by yourselves for your own purposes, will not be paid for.

On March 29, 1933, Callahan-Walker Construction Co. asked the contracting officer to reconsider its claim and on April 22, 1933, submitted details, claiming $11,090.64 for backfilling old borrow pit between Stations 3219 and 3252, 92,422 cubic yards at 12 cents.

No further action was taken by the contracting officer and on August 9, 1933, the partnership of Erickson & Hardwick, by L. D. Crawford, attorney-in-fact, submitted an identical claim to the Chief of Engineers, U. S. Army. This claim was eventually presented to the Comptroller General of the United States, who, on August 20, 1934, finally denied it in a written opinion which is reported 14 Comp. Gen. 141.

6. The contracting officer did not at any time order the contractor to place any fill in the old borrow pits.

The foundation under the levee as enlarged was possibly not uniform as to strength, but there is no satisfactory proof that if the old borrow pits had not been refilled by the contractor there would have been a subsidence of the newly enlarged levee, and the plaintiff has failed to show by a preponderance of the evidence that the extra work was necessary to the completion of the project.

The court decided that the plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

The plaintiff is administratrix of the estate of Walter S. Hardwick, who died intestate January 14, 1936. The

decedent, during the contract period here involved, was a member of the partnership of Erickson & Hardwick, which was composed of the decedent and Carl Erickson. Subsequent to the contract period Carl Erickson died and the partnership was dissolved, Walter S. Hardwick surviving.

On November 17, 1932, Erickson & Hardwick entered into a contract with the defendant to perform certain work required for the construction of a levee. Work to be performed under the contract was sublet by the partnership to W. E. Callahan Construction Company with the approval of the United States. Compensation under the contract was paid to the W. E. Callahan Construction Co. who in turn sublet the work to the Callahan-Walker Construction Company which actually performed the work and to which if any amount is recovered herein by the plaintiff will be paid. Those actually performing the work are hereinafter referred to as the "contractor."

The contractor performed the work specified in the contract and was paid for it in accordance therewith. It also did other work not provided for either in the contract or the specifications for which it has demanded payment. This demand being refused, it now brings suit to recover the reasonable value of the extra work done. The defense presented is that the extra work was not ordered by the contracting officer nor was it necessary to the completion of the project.

Article 5 of the contract provided that "no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order."

The findings show not only that the work was not ordered by the contracting officer but that plaintiff was informed that if done it would not be paid for. See Finding 5.

While we have held that when changes are ordered by the contracting officer in the manner provided by the contract, and the work is necessary for the completion of the project and is received and accepted by the Government, that an implied contract arises to pay the reasonable value of the work; it has also been held that where the contract provides that no payment should be made for any extra

work or material unless it is ordered in the manner prescribed by the contract, that this clause is fatal to any recovery by the contractor for the work not so ordered. See *Plumley* v. *United States*, 43 C. Cls. 266, 280, 281; *Plumley* v. *United States*, 226 U. S. 545, 547; *Hyde* v. *United States*, 38 C. Cls. 649, 658, 659; *Morgan* v. *United States*, 59 C. Cls. 650, 654.

The failure to comply with this provision is sufficient without anything else to prevent recovery in the case but another matter should be noticed.

The Commissioner of this court made a finding which in substance was to the effect that the work was not necessary for the completion of the project. Plaintiff strenuously objects to this finding but upon examination of the evidence, we think it is substantially correct and, changing the wording slightly, we have found that plaintiff has failed to show by preponderence of the evidence that the work was necessary to the completion of the project. This also would prevent a recovery in the case.

The plaintiff's petition must be dismissed and it is so ordered.

MADDEN, *Judge;* JONES, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

BRAEBURN ALLOY STEEL CORPORATION v. THE UNITED STATES

[No. 43494. Decided January 5, 1942]

On the Proofs

Compensation under Fifth Amendment to the Constitution; consequential damage as distinguished from a taking.—Where an office building and its contents, belonging to plaintiff, were destroyed as a result of the flood in the Allegheny River in 1936; and where the adjacent dam erected on said river in 1927 by defendant and the protective dike erected shortly thereafter by defendant were adequate to protect fully the adjacent property, including the property of plaintiff, against any flood that had ever been known in that area; it is *held*

that the construction of said dam in 1927 and other acts connected therewith did not constitute a taking of plaintiff's property by the Government within the meaning of the Fifth Amendment to the Constitution and that whatever damage was caused to plaintiff's property at the time of said flood by reason of the presence of the dam in the river was consequential in its nature, for which the Government cannot be required to respond in damages.

Same.—There is a marked distinction between a taking for public use, for which just compensation must be paid, and mere resulting damage. *Bedford* v. *United States*, 192 U. S. 217; *Marret, Administrator, et al.* v. *United States*, 82 C. Cls. 1; 299 U. S. 545 cited.

Same.—Where, in the making of improvements by the Government within the legal limits of a navigable stream there is some incidental or consequential damage resulting to the owner of private property, there is no taking of such property by the Government and hence no liability. *Sanguinetti* v. *United States*, 264 U. S. 146; *Danforth* v. *United States*, 308 U. S. 271; *Marret, Admr. et al.* v. *United States*, 82 C. Cls. 1; 299 U. S. 545 cited.

Same; Government not an insurer.—The Government is not an insurer of riparian owners against damages resulting from floods.

Same; cases distinguished.—*United States* v. *Lynah*, 188 U. S. 445, and *United States* v. *Cress*, 243 U. S. 316, representing the greatest lengths to which courts have gone in permitting recovery in cases similar to the instant suit, are distinguished.

The Reporter's statement of the case:

Mr. Herman J. Galloway for the plaintiff. *King & King* were on the briefs.

Mr. Percy M. Cox, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is and at all times pertinent hereto was a Pennsylvania corporation with its principal place of business at Braeburn, Pennsylvania.

2. For many years prior to and including 1936, plaintiff had a plant located on the east side, or left bank, of the Allegheny River in Pennsylvania, about thirty miles north of Pittsburgh and adjacent to the village of Braeburn. It is still at the same place. The plant was designed for use in the manufacture of high-grade tool steel and other steel of a

special character and has continued to be used for that purpose. The original buildings were constructed about 1898 and additions have been made thereto from time to time since that date.

The plant consisted of various structures of the usual type in a business of that character, including the steel mill, storehouses, and other buildings. One of the buildings was an office building of brick construction, the older part of which was built in 1904 and an addition thereto in 1916. The office building contained the ordinary office equipment, files, and supplies for a business of that character, and plaintiff's metallurgical and chemical laboratories were located therein. It also contained the furniture, fixtures, and equipment for a dining room and a kitchen to supply food to the officials and employees of the plaintiff.

Plaintiff's land on which the plant was located extended for a distance of approximately 2,000 feet from a point slightly below the location of what is known as Dam No. 4, up the river and adjacent to the pool formed by that dam. The strip of land on which the plant was located was situated between the Allegheny River and hills of considerable elevation along the river. The soil on which the plant was located and in the area at and near Dam No. 4 was of an alluvial character, subject to erosion, and consisted of sand, gravel, silt, and similar material which had been deposited by water between the river bank and the hills. The distance from Dam No. 4 to the hills opposite thereto was approximately 800 feet.

The tracks of a line of the Pennsylvania Railroad were located between plaintiff's plant and the hills. The elevation of the railroad at the point where the dike, hereinafter referred to, tied into the railroad track was 765.5 feet above sea level and varied from that elevation to approximately 760 feet at or near the lower end of plaintiff's plant. The elevation of the ground on which plaintiff's plant was constructed varied from approximately 755 feet at one low point at the office building to approximately 762. The average elevation at the office building was 758.

3. In September 1927, the defendant, for purposes of navigation, completed a lock and dam known as Dam No. 4 which extended across the Allegheny River from Braeburn on the

east bank to Natrona on the west. The dam consisted of a concrete structure located on bed rock. On the east side, the dam was tied into a concrete abutment which was likewise located on bed rock at an elevation of 702 feet. The abutment, approximately 100 feet in length, was constructed parallel to the bank of the river and had a wing on each end which extended into the bank (soil) approximately 25 feet. The abutment was located approximately 150 feet in a southwesterly direction from plaintiff's office building heretofore referred to. The pool level immediately below the dam was at an elevation of 734.5 feet and the pool level of the dam was at an elevation of 745 feet. The ordinary high water mark at the dam was 747 feet. The top elevation of the abutment was 757 feet, which was approximately two feet higher than the top elevation of the bank of the river at that point. The dam and abutment, including the dike referred to, were constructed in such form and manner that they had withstood all flood waters experienced since their construction. Such construction was of a character reasonably adequate to withstand any flood waters of the type theretofore experienced or recorded at that point.

The dam raised the pool level of the river approximately 10.5 feet, which resulted in raising the water table of the land in that area, including plaintiff's land adjacent to the pool of the dam. This raising of the water table adjacent to plaintiff's land made the land which was of an alluvial nature more unstable because of the water which penetrated therein, increased the pressure thereon, and therefore made it more subject to erosion.

In the original plan for the construction of the dam, no provision was made for the construction of the dike extending from the dam upstream between plaintiff's property and the river, but at or about the time of the completion of the dam, when high waters indicated an immediate need therefor to prevent the water from overflowing on plaintiff's property and other properties, a dike was constructed which extended from the dam upstream a distance of approximately 2,500 feet where it was tied into the fill of the tracks of the Pennsylvania Railroad. For approximately 2,000 feet of that distance it was adjacent to plaintiff's property and between

its property and the river, and for that distance it was constructed on land belonging to plaintiff. When it was decided to build the dike, defendant instituted condemnation proceedings to acquire title to the necessary land. In view of the emergency, defendant almost immediately began construction of the dike without waiting for the completion of the condemnation proceedings, though title was ultimately acquired through such proceedings. The dike was built to an elevation of 766 feet which was approximately 11 feet higher than the general bank level of the river, and tied into the railroad at an elevation of 765.5 feet. It was constructed of sand and gravel obtained from the river bed.

4. On and shortly prior to March 17, 1936, heavy rains occurred in the watershed of the Allegheny River which together with the melting snows in that area caused the highest flood at plaintiff's plant ever recorded. The highest elevation previously reached by floodwaters at that point was in 1913 when an elevation of 761.75 was reached, whereas the flood here in question reached an elevation of 768.8. It was the most disastrous flood in the history of that area. The lower part of the city of Pittsburgh was inundated and serious damage was sustained by property owners along the Allegheny River through the inundation and washing away of structures, erosion of land, and in other ways.

The abnormal rise of the river began on March 17, 1936, and by midnight, or shortly thereafter, the floodwater had overtopped the dike referred to in finding 3. With the overtopping of the dike, the water flowed into and around plaintiff's plant. However, prior to the overtopping of the dike, boils and bubbles appeared at various places in the dike where water came through, though no break or crevasse of an appreciable size occurred in the dike until about the time it was overtopped. The flood overtopped the dike at all points and finally washed it away in many places. The dam, when the flood was at its height, resulted in raising the elevation of the river above the dam approximately five inches and impeded the velocity of the river at that time in only a slight degree. At the crest of the flood the water was approximately eight feet deep in plaintiff's mill buildings, and its office building was covered with water to with-

in three feet of the eaves, that is, about thirteen feet from the ground elevation. The crest of the flood was reached on March 18, when it began to recede, and by the afternoon of March 19 it had receded to the extent that both plaintiff's main plant and office building were substantially free from water.

5. When it was found that the floodwaters had receded from its plant, plaintiff began making preparations to resume operations and notified its employees to report for work the following day (March 20) for the purpose of cleaning up debris, restoring the damaged portion of the plant, and doing other general restoration work. Included in the work to be done was the removal of debris from the office building and the reclaiming and drying out of office records and equipment in that building.

However, late on the evening of March 19, erosion was observed along the bank of the river a short distance below the dam and defendant began preparations to combat it. Whether erosion was also taking place at the abutment at the time the erosion downstream was observed could not be determined since the floodwaters were overflowing the area between the abutment and plaintiff's office building. The dam, however, was contributing to the erosion below the dam in that it was causing in that area along the bank of the river an eddying or whirlpool condition which was cutting away the bank. Not until the late morning of March 20 did plaintiff's office building appear to be in danger. However, by about nine or ten o'clock on the morning of March 20, erosion became very evident around the end of the abutment, a channel approximately 20 feet in width having been cut between the abutment and plaintiff's office building. The erosion which had started as indicated above continued in a somewhat L-shaped manner, scouring and cutting into the bank opposite and below the abutment. The current in the channel around the abutment was swift with a whirlpool or eddy movement, which cut rapidly into the bank between the abutment and the office building.

In spite of heroic efforts on the part of defendant's representative to stop the erosion from the floodwaters, it con-

tinued and by about noon on March 20 it appeared that the erosion could not be stopped before it reached plaintiff's office building and that that building was doomed. By five p. m. on that day the channel had cut to within one foot of the building and about one hour later a corner of the building collapsed and slid into the river. The erosion continued, undermining and taking parts of the office building. On March 22 the erosion had taken away the greater part of the ground on which the office building stood and only a small part of the building was left standing. On that day defendant's representatives caused the remaining part of the building to be pushed into the stream for the purpose of assisting in arresting the erosion. The erosion, however, continued until March 28 when it was finally stopped after having cut away all of the ground on which the office building was located. The channel around the abutment was cut to a depth of approximately 50 feet.

6. When the erosion was first observed near Dam No. 4 on March 19 and 20, defendant proceeded promptly with steps not only to arrest the erosion but also to protect the property in that immediate area. Large quantities of material of various kinds, including stone, box cars, and sand bags were used and the erosion was finally arrested by about March 28. Defendant expended approximately $350,000.00 in this protective and arresting work.

Thereafter defendant not only restored plaintiff's and other land similarly affected to approximately its condition prior to the flood, but also improved and restored the abutment and dike. The primary purpose of the restoration work was to protect the abutment and dam. The dike was reconstructed from the abutment upstream and it was also extended downstream from the abutment to a point where it joined a road below the dam. A weir was then constructed by driving sheet steel piling in a line with the dam across the gap formed by the washout between the abutment and the railroad, a distance of approximately 350 feet. The space between the piling and the existing bank upstream was filled with sand and gravel to an elevation of 758 feet. Below the piling, sand and gravel were placed to form a slope of ap-

proximately one on two and the surface of this fill was protected by heavy derrick stone. In addition riprapping was placed along the dike for a distance of approximately 230 feet upstream from the abutment, and all of the fill downstream from the abutment was riprapped. The dam and abutment were unharmed by the flood, but in the restoration work the lower part of the abutment retaining wall extending downstream from the dam was raised from elevation 747 to elevation 757, the height of the abutment adjacent to the dam. The total cost of such restoration work was approximately $175,000.00.

7. When it appeared that the office building would be destroyed, plaintiff made every reasonable effort to save its contents, but salvaged only four desks, three typewriters, an adding machine and a small safe containing some accounting records. With the exception of the safe, these articles were of little or no value thereafter.

Only a short time elapsed between the discovery that the building would be destroyed and its actual collapse. During a portion of this time it was unsafe for workmen to enter the building, even if access thereto had not been made difficult by the presence of debris obstructing the entrances. It was because of these circumstances that so little of the contents of the building was removed.

On March 17, 1936, the fair market value of the office building, including the concrete steps, sewer, plumbing, heating, and lighting equipment and fixtures, plus the fair market value on the same date of the furniture, office fixtures and equipment, supplies, laboratory equipment, and kitchen and dining room equipment in the office building, exclusive of the equipment removed during the flood, was $40,000.00.

What damage was sustained to the office building and its contents by the flood prior to the time the building collapsed does not satisfactorily appear from the record.

8. April 23, 1936, plaintiff filed with the War Department a claim for damages which included, among other items, a claim for loss of the office building and its contents referred to above. The War Department disallowed the claim September 16, 1936.

The court decided that the plaintiff was not entitled to recover.

JONES, *Judge*, delivered the opinion of the court:

Plaintiff seeks to recover the value of a building and its contents at the time of their destruction during the flooding of the Allegheny River in 1936. In order to bring itself within the jurisdiction of this court, it contends that the defendant is liable for the damages in question for the reason that through the construction of a dam in 1927 and other acts connected therewith the defendant created a condition as a result of which the floodwaters destroyed its building, and that therefore there was a taking of its property within the meaning of the Fifth Amendment to the Constitution.

For many years prior to and including the year 1936 plaintiff owned and operated a steel mill located on the east side, or left bank, of the Allegheny River in Pennsylvania. In 1927 the defendant constructed a dam across the Allegheny River near the lower end of plaintiff's land. Plaintiff's plant was in that location at the time and had been there for some 25 or 30 years prior thereto. The land on which the plant was located extended for a distance of approximately 2,000 feet upstream from a point about opposite the dam.

The dam was built to a crest elevation of 745 feet above mean sea level, which was 2 feet below the ordinary high-water mark at that point. The dam was tied into a concrete abutment 100 feet in length which was provided with wing walls extending 25 feet into the river bank. A few months after the completion of the dam, when it appeared that the floodwaters might damage the property of adjacent owners, including plaintiff, defendant constructed a dike 11 feet in height along the river bank, thus bringing the top of the dike to an elevation of 766 feet. This dike extended from the dam approximately 2,500 feet upstream where it was tied into a railroad at an elevation of 765.5 feet. Plaintiff's plant was located between the dike and hills of considerable elevation to the east thereof. The railroad tracks which had an elevation at the upper end of 765.5 feet were between plaintiff's plant and the hills. The elevation of plaintiff's property varied from a low point of 755 to a high point of 762 feet.

On March 17, 1936, an unprecedented flood occurred which raised the waters of the Allegheny River to an elevation of 768.8 feet, which was 7 feet higher than the highest previous flood and 2.8 feet higher than the top of the dike opposite plaintiff's property. With the overtopping of the dike the floodwaters overflowed plaintiff's plant, such waters reaching a height of 8 feet in the steel mill and 13 feet in its office building, which was within 3 feet of the eaves. While considerable damage resulted to its contents, the office building itself remained standing until its later destruction as hereinafter shown.

The crest of the flood was reached on March 18, and by the afternoon of the following day it had receded to the extent that not only plaintiff's plant but also its office building was substantially free from water. As soon as the water began to recede, it was discovered that erosion was taking place along the bank of the river a short distance below the dam. At that time water was flowing around the end of the dam near plaintiff's office building. The dam was contributing to the erosion by causing an eddying or whirlpool condition in that area along the bank of the river, which was cutting away the bank. By the following morning the erosive action of the river had cut a channel around the end of the abutment between the abutment and plaintiff's office building. This erosive action continued for several days and, in spite of heroic efforts on the part of the defendant to arrest the erosion, it cut away the land underneath plaintiff's office building which for the most part fell into the river. One small corner of the building which remained was pushed into the floodwaters to assist in stopping the erosion. Not only was the building lost but almost the entire contents thereof.

Thereafter defendant restored plaintiff's land to approximately its condition prior to the flood, and also made major improvements to the abutment and to the dike. As a part of this protective work defendant constructed a weir by driving sheet steel piling in a line with the dam across the gap formed by a washout between the abutment and the railroad, a part of which was located on plaintiff's property, and filled the space between the piling and the existing bank upstream with sand and gravel. The dam and abutment were unharmed by the flood.

On these facts, which we have set out in more detail in our findings, plaintiff seeks recovery.

At the outset it should be observed that the parties are agreed that the dam and abutment were constructed as an aid to navigation on a navigable stream where the Government had a right to build them and that no land taken in connection with their construction is involved. It should be further kept in mind that the dam and abutment were constructed below the level of the ordinary high-water mark, and that the power of the Government over navigation covers the entire bed of a navigable stream, including all lands below ordinary high-water mark. *United States* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co. et al.*, 312 U. S. 592, decided by the Supreme Court March 31, 1941.

What plaintiff claims is the value of its property which was destroyed during the flood of March 1936, on the ground that in effect there was a taking of its property because the presence of the dam in the river contributed to its destruction. It is well established that where private property is taken for public use just compensation must be paid to the owner of such property, but it is likewise true that there is a marked distinction between a taking and mere resulting damage. *Bedford* v. *United States*, 192 U. S. 217; *Marret, Administrator, et al.* v. *United States*, 82 C. Cls. 1, certiorari denied 299 U. S. 545.

Where, in the making of improvements by the Government within the legal limits of a navigable stream, there is some incidental or consequential damage resulting to the owner of private property, there is no taking of such property by the Government and hence no liability. *Sanguinetti* v. *United States*, 264 U. S. 146; *Danforth* v. *United States*, 308 U. S. 271; *Marret, Administrator, et al.* v. *United States*, *supra*.

The Government is not an insurer of riparian owners against damages resulting from floods. The fact that it required the intervention of another and efficient cause, namely, the abnormal flood, to produce the injury of which plaintiff complains, clearly indicates that what plaintiff is seeking to recover is not for a taking but for consequential damages and it is well established that the Government is

not liable for damages of that character. *Bedford* v. *United States*, *supra; Jackson* v. *United States*, 231 U. S. 1; *Sanguinetti* v. *United States*, *supra*. *L. J. Houze Convex Glass Co.* v. *United States*, 81 C. Cls. 661, certiorari denied 296 U. S. 611. In the last-named case this court held that where a privately owned gas well adjacent to a pool created in a navigable river by a dam constructed by the Government for the improvement of navigation was not inundated or its operation materially interfered with by the waters of the pool at normal pool level, its inundation and being rendered valueless by the occasional floodwaters of the river did not constitute a taking of private property for which compensation might be recovered from the Government.

An examination of the facts in this case on the basis of the principles and authorities set out above clearly reveals that there was no taking for which the Government must respond in damages, but that it is a case of consequential damages for which the Government is not liable. Plainly without the flood the damages complained of would not have occurred. In fact, in view of the protection afforded to plaintiff's property by the dike constructed by defendant between plaintiff's property and the river, it is even conjectural whether plaintiff suffered more or less loss due to the presence of the dam in the river with its attendant abutment and dike. Plaintiff's plant was located on ground which varied in elevation from 755 to 762 feet, whereas the dike in front of that property was to an elevation of 766 feet. The crest of the flood was at an elevation of 768.8. At its crest the height of the floodwaters was raised by the dam only about six inches. Until the dike was overtopped, substantial protection was afforded to plaintiff's plant and even after the overtopping it is only reasonable to assume that some further protection was afforded in breaking the force of the waters as they flowed into plaintiff's plant, thereby decreasing the damage which might otherwise have occurred.

The measure of damages which plaintiff would have us apply illustrates the difficulties which would be encountered in determining the damage attributable to defendant, if the defendant could be held liable. The damages sought are

the value of the office building and its equipment at the time of the flood, without taking into consideration that substantial damage had already occurred directly from the flood prior to the time the building was undermined from erosion and destroyed. Prior to the time of its total destruction, the building had been submerged in waters from the flood almost to its eaves and not only had its contents been severely damaged, but some damage had also been done to the building itself. Certainly the damage done the building and its contents prior to the time it fell into the river was caused by the flood alone and can in no way be attributed to work which defendant had done at that point on the river.

In an effort to bring itself within the various decisions allowing compensation for the taking of property, plaintiff sets out instances where it says there were invasions of its property by the Government and therefore a taking. In the first place, it says that the dam and dike were inadequate and were not properly constructed, which acts of omission or negligence caused an invasion, destruction, or taking of plaintiff's property. The first answer to this is that the record shows the dam, abutment, and dike were constructed in accordance with good engineering practice and that they not only had withstood other high floods but would reasonably have withstood any flood of the character previously experienced on this river. The destruction in question came with an abnormal flood which raised the water some seven feet higher than any previous flood. But even if it could be said that there was something in the nature of negligence in this construction work, this would not aid plaintiff for the reason that an action thereon would sound in tort, of which this court does not have jurisdiction. *Mills et al.* v. *United States*, 46 Fed. 738, and *Bigby* v. *United States*, 188 U. S. 400.

Plaintiff's further suggestion that some basis for this cause of action exists because defendant sent its men and equipment onto plaintiff's land in order to try to stop the erosion which eventually resulted in the destruction of plaintiff's property, can not be taken seriously. In his testimony plaintiff's president had this to say of those efforts:

"Well, I certainly would be very unappreciative if I did not give credit to the Engineer's Office and Major Styer and those that were interested in the very apparent effort that they made by shipping in trainloads of rock and stone and all kinds of stuff to make a closure. That is what you refer to? I am glad to give credit for that." With respect to the restoration work after the flood, not only was plaintiff's ground restored, but also substantial protective work was carried out. Whether the protective work, including the weir, encroached upon and used any of plaintiff's land for which compensation should be allowed is not an issue in this case.

The two cases on which plaintiff places main reliance as showing an actionable taking of the property similar to that involved in the instant case are *United States* v. *Lynah*, 188 U. S. 445, and *United States* v. *Cress*, 243 U. S. 316. These cases have been referred to on more than one occasion as representing the greatest lengths to which courts have gone in permitting recovery in cases of this kind. (*Transportation Company* v. *Chicago*, 99 U. S. 635; *Franklin et al.* v. *United States*, 101 Fed. (2d) 459; and *United States* v. *Sponenbarger et al.*, 308 U. S. 256.) In the very recent case of *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, *supra*, the application of the doctrine outlined in those cases (*Lynah* and *Cress*) was limited and qualified. The tendency has been to limit rather than to extend the application of this doctrine.

In addition those cases are easily distinguishable on their facts from the case at bar. In the *Lynah* case there was a permanent flooding of the property; in the *Cress* case the flooding, though intermittent, was regular and frequent. In both cases these continuing conditions naturally followed from the construction of the dam, and were the foreseeable results of its construction.

This is far different from the circumstances of an unprecedented and unforeseeable flood where, as in the instant case, the dam and protective dike were adequate to fully protect the adjacent property against any flood that had ever been known in that area. In the latter case essential elements of an actionable taking are necessarily absent.

In view of the foregoing we find that the acts complained of by plaintiff did not constitute a taking of its property by the Government within the meaning of the Fifth Amendment to the Constitution, and that whatever damage was caused to plaintiff's property by reason of the presence of the dam in the river was consequential in its nature, for which the Government can not be required to respond in damages.

It follows that the petition should be dismissed, and it is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

INTERNATIONAL-STACEY CORPORATION v. THE UNITED STATES

[No. 44276. Decided January 5, 1942]

On the Proofs

Patent for radio antenna system; validity; infringement.—On the facts disclosed by the evidence adduced, pertinent to the question of validity and infringement of patent #2,008,931, to Charles E. Schuler, at issue in the instant case; it is *held* that claim 4 of said patent is invalid under the prior art; that claims 5 and 7 as specifically limited are not applicable to the alleged infringing structure, and that if said claims were so interpreted as to disregard the specific limitation contained therein they, also, would be invalid in view of the prior knowledge and uses; and plaintiff is accordingly not entitled to recover.

Same; prior art and use.—Prior to any effective dates of the Schuler invention, patent #2,008,931, in suit, those skilled in the art had knowledge:

(a) That both the conductivity and dielectric constant of the earth affected the distribution of current adjacent the antenna, and that a loss of energy was likely to occur by the penetration of the lines of force through the earth to a buried ground system.

(b) That a variation in the pattern of the radiated waves from the antenna would be caused by variations of conduc-

tivity in various portions of the ground under or adjacent to the base of the antenna.

(c) That a metallic ground screen located under the antenna, elevated above the surface of the ground, and grounded at various points in its periphery, would function to reduce the effects set forth in items (a) and (b) and would therefore return or reflect energy to the antenna which would otherwise be lost.

Same.—The beneficial effect of ground screens located at the base of the antenna was well known to those skilled in the art, and to utilize such a ground screen in connection with a pyramidal tower antenna such as is disclosed in the prior art would not produce any novel or unforeseen result and would not involve invention, and claim 4 in issue is accordingly invalid.

Same.—If claims 5 and 7 are so interpreted as to disregard the specific limitation contained therein as to the ground screen or metallic plate member being located on the "*ends of the insulators*," these claims will be invalidated in view of the prior knowledge and use of ground screens located at the base of the antenna.

Same.—The proof shows that the radio antenna ground screen claimed in the patent in suit is the same, or substantially the same, as ground screens previously described and used, and that it performs the same function in the same way to obtain the same results.

Same.—That which would infringe if later will anticipate if earlier.

Same.—The plaintiff cannot assert a broad construction of its claims in order to make out a case of infringement and then narrow its claims so as to avoid anticipation.

The Reporter's statement of the case:

Mr. Samuel Scrivener, Jr., for the plaintiff. *Mr. William S. McDowell* and *Mr. Albert R. Grobstein* were on the brief.

Mr. Paul P. Stoutenburgh and *Mr. Walter J. Blenko*, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. T. Hayward Brown* was on the brief.

Plaintiff brings this suit to recover $35,000 as compensation for the alleged unauthorized use by the defendant of a patent directed to a radio antenna system for the generation and propagation of electromagnetic waves for radio transmission.

The defendant insists that the patent claims in suit are invalid under prior patents, publications, and uses.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. This suit alleges infringement of United States patent to Charles E. Schuler 2,008,931, issued July 23, 1935, on an application filed April 30, 1934.

The patent in suit is directed to a radio antenna system for the generation and propagation of electromagnetic waves for radio transmission.

2. The plaintiff, an Ohio corporation, was organized April 21, 1931, and on the date of filing the petition herein was in good standing as a corporation of that State. It has a place of business at 875 Michigan Avenue, Columbus, Ohio. The plaintiff is a manufacturing corporation.

3. The application which materialized into the patent in suit was filed in the United States Patent Office on April 30, 1934, the oath of this application being executed on April 23, 1934.

A certified copy of the file wrapper and contents of the application (plaintiff's Exhibit 7) is by reference made a part of this finding.

4. The patent in suit, a copy of which (plaintiff's Exhibit 1) is by reference made a part of this finding, was issued to the plaintiff corporation on July 23, 1935, the same having been assigned to plaintiff by Charles E. Schuler in an assignment executed April 23, 1934, which assignment was duly recorded in the United States Patent Office. A certified copy of the same (plaintiff's Exhibit 6) is by reference made a part of this finding.

Plaintiff corporation ever since the issuance of the patent has been the sole and exclusive owner of the entire right, title and interest therein.

5. The subject-matter of the present case relates to radio transmitting systems and involves certain basic principles involved in antenna construction.

There is diagrammatically illustrated herewith a simple vertical antenna comprising a wire or vertical conductor, this illustration being reproduced from paragraph 22 of the prior art publication "Radio Telephony for Amateurs" (Finding 27). As used for transmission, the antenna is suitably insulated from the earth and energized by a source

of high-frequency energy, one terminal of this source being connected to the antenna and the other terminal connected to the earth.

The antenna has an electrical capacity effect with respect to the earth similar to that existing in an electrical condenser, the antenna comprising one plate thereof and the earth comprising the other plate of the condenser.

In a condenser it is fundamental that the capacity effect is greatest and the electrostatic field is a maximum where the distance between the plates is a minimum.

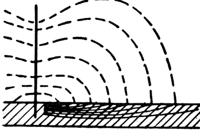


Fig. 51.—Showing flow of currents in the earth in a typical case of direct grounding (Zenneck).

In the simple antenna diagrammatically shown, the capacity effect is therefore the greatest at the base thereof, where portions of the antenna are nearest the earth, the capacity effect at any point in the vertical antenna diminishing from the base thereof to the top.

When the antenna is energized from the high-frequency source, lines of electrical force, shown in the illustration as dotted lines, develop between the antenna and the earth, these lines of force being most intense and concentrated at the por-

tion of the antenna nearest the earth, or at the base of the antenna, and diminishing in intensity and concentration at points remote from the base of the antenna. These lines of force cause currents to flow in the earth as shown in the illustration in solid lines, which converge adjacent the lower end of the antenna, the current density being greatest at this point.

6. The earth is usually a relatively poor conductor and possesses electrical resistance, and the current flowing back to the antenna through the earth is partially dissipated as heat. The resistance characteristics of the earth may also vary, being dependent upon the character of vegetation and condition of the ground, whether the ground is wet or dry.

In order to decrease the loss of the current flowing in the earth, and in an attempt to obtain constant antenna characteristics, it has been the usual and standard practice in the art to provide a metallic ground or network which will provide a substantially low resistance surface, having constant electrical properties and through which the ground currents may return to the generator. The conventional form of ground system employed in the prior art is a system of 8 to 120 metallic wires radiating outward symmetrically, like the spokes of a wheel, from the base of the antenna to a distance of approximately one half of the emitted wave length, and buried a short distance below the surface of the ground. In a typical broadcasting station these wires are about 450 feet long.

Where the earth has a very high resistance the wires of the ground system are supported above the surface of the earth and are either insulated from the earth or each wire is connected to the earth at its extremity. Such systems are known in the art as counterpoises and are the functional equivalent of the buried ground system.

Economic factors may influence the extent and character of the ground system employed.

7. About 1930 the so-called vertical, self-supporting radiating tower antenna came into use. This structure consists of a metallic tower structure having a polygonal cross-section supported on legs, insulating means being interposed between

each leg and the earth. Instead of the tower acting merely as a support for an antenna, the structural members of the tower are connected to the source of high frequency and the entire tower functions as the antenna.

The relatively large horizontal cross-sectional area of such tower antennas and particularly of the base thereof causes a more intense electrical field to exist between the lower part of the antenna and the earth than in the case of a vertically supported wire antenna of relatively small horizontal cross section.

THE PATENT IN SUIT

8. As stated in the patent in suit, the disclosure thereof relates to—

> * * * the art of radio broadcasting and transmission of electromagnetic waves through space by means of a radio tower or vertical antenna radiator; and more specifically to a novel high vertical radiator or antenna comprising a self-supporting tower structure insulated from a base and separated therefrom by a grounded condenser; * * *.

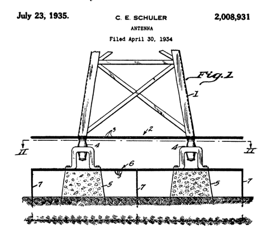
The patent specification, after making reference to certain prior art constructions to avoid radiation ground losses, states that—

> The present invention is not to be confused with these prior proposals, although one of the achieved objects of the present invention is the reduction of ground loss energy. Other advantages and achieved objects include a vertical radiator that is substantially self-supporting without the use of guy wires; a vertical tower structure approximating theoretical maximum effectiveness of the height-wave length ratio; a composite apparatus that is simple in construction, takes relatively little space, and is efficient in wave transmission; a four-cornered tower structure having a highly conductive ground screen which functions as an element of a condenser which returns energy to the radiating system.

The preferred embodiment illustrated in the drawings of the patent in suit, Fig. 1 of which is reproduced herewith, comprises a rectangular tower formed of structural

steel members and girders, having a relatively broad base tapering to a narrow top.

As shown in the drawing, Fig. 1, the tower structure 1 is supported on a plurality of insulators 4 which are in turn carried or supported on foundation piers 5. In the preferred embodiment of a metal framework 2 carrying a plurality of soldered intersecting copper wires 3 forms a screen or shield which is electrically connected to the bottom of the tower.



A second shield or screen 6, which is likewise formed of intersecting wires, is stated to be "carried or supported on the foundation piers," this second screen being connected at a multiplicity of points along its boundary or edges by leads 7 to a conventional buried ground system which, as stated, may be either radial or a grid of wires. The two shields 2 and 6 have interposed between them the insulators 4, the specification stating that this combination functions as a two-plate condenser between the tower proper and the ground.

With particular reference to the lower screen or ground screen the specification states as follows:

> By the present invention, however, the ground screen provides a highly conductive path upon which the electrostatic lines of force from the lower part of the tower terminate, and this screen being placed slightly above the surface of the ground, shields and prevents the intense electric field from existing at the surface of the ground.

Although the patent drawing discloses that the frameworks or screens 2 and 6 are coextensive, and have dimensions substantially double the spacing of the tower legs, there is no limitation or instruction given in the specification to those skilled in the art as to the size or area of the screens to be used.

The only statement contained in the specification with respect to the location of screen 6 is that it is to be "placed slightly above the surface of the ground." The specific embodiment disclosed in the drawings shows the ground screen 6 located at the bottom end of the insulators.

The specification further indicates that the elements or screens 2 and 6 may be made preferably in screen form with soldered intersecting wires of high conductivity, but both frameworks may be of solid conducting material if desired.

9. The claims in suit are as follows:

> 4. A wave antenna tower comprising a plurality of upright members interconnected by rigid structural members, said tower being of pyramidal form with the lower base ends thereof insulated from the ground by insulators, and means below said insulators for reflecting energy normally lost and returning it to the tower.
>
> 5. In a radiating tower antenna, a base support, insulators mounted on said support, and a condenser formed by metallic members on the opposite ends of said insulators comprising a grounded electrically conducting metallic plate disposed on the ends of the insulators closer to the ground and a metallic tower structure disposed above said insulators.
>
> 7. In a radiating tower antenna, a base support insulators mounted on said support, and a condenser formed by metallic members on the opposite ends of said insulators comprising a grounded electrically conducting

metallic plate member disposed in a plane substantially perpendicular to the axis of said tower on the ends of the insulators closer to the ground and a metallic tower structure disposed above said insulators.

10. While certain other claims of the patent not in issue, such as claim 3, contain phraseology directed to the pair of screens, the claims in suit are not so limited and do not include as an element the upper screen.

11. There is no evidence of conception or reduction to practice prior to April 30, 1934, the filing date of the application, of any of the subject-matter of the claims in issue.

12. In the latter part of July 1935, and in August 1937, the plaintiff, through its employee Schuler, at conferences with Mr. A. W. E. Jackson, Chief of the Radio Development Section of the Bureau of Air Commerce, and other officials of the Bureau of Air Commerce, gave oral notice of the existence of the patent now in suit.

There is no satisfactory evidence of any written notice.

The plaintiff, through the International Derrick and Equipment Company, its wholly-owned subsidiary, has sold and erected ground screens in connection with self-supporting antenna towers. There is no evidence that any of the equipment thus sold or erected has had any patent markings thereon.

THE ALLEGED INFRINGING STRUCTURE

13. The structures alleged to be infringements of the Schuler patent were purchased by the United States from the Blaw-Knox Company under contract #CC-2646 dated August 26, 1937, for 400 radio antenna towers, complete with sub-base, insulators, radiator, counterpoise, etc., the specifications and drawings for which are included in the contract.

The specification includes the following paragraphs:

1. GENERAL DESCRIPTION:

This specification describes a self-supporting insulated antenna tower to be used by the Bureau of Air Commerce. To insure a uniform electrostatic capacity for each tower regardless of varying heights of snow or vegetation in the vicinity of the tower, a counterpoise to be supplied on this specification will be located around each tower. * * *

2. TYPE OF CONSTRUCTION AND DIMENSIONS:

* * * * *

The tower proper is to be supported on a steel base approximately eight feet high which will rest on the concrete footing. In order to reduce the capacity between tower and sub-base as much as possible, no horizontal member shall be used at the bottom of the tower or the top of the sub-base. However, horizontal members shall be provided approximately two feet below the top of the sub-base on all four sides to support the counterpoise framework. Supplemental diagonal bracing may be used if desired.

9. TOWER INSULATION:

Towers shall be insulated at the base with wet plastic process porcelain insulators which shall be designed so that they will adequately stand up under all stresses which will take place under the maximum loads specified. Porcelain insulators shall be given a high glaze to further assist in making them nonhygroscopic and to minimize the collection of dirt on the insulator surface. Insulators using inflammable materials, such as oil or phenolic compounds, shall not be used.

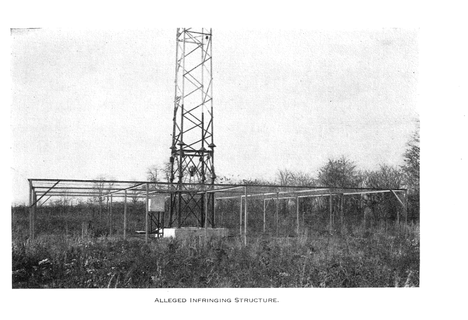
18. COUNTERPOISE:

With each tower the manufacturer shall provide a counterpoise complete as shown in Drawing No. 1382A, revised 7/1/37, to be made of standard structural steel angles shipped completely knocked-down for bolting together in the field. * * * The counterpoise is to be designed for attaching to the horizontal members which are provided two feet below the top of the tower sub-bases. The mesh for the counterpoise is to be supplied in lengths of 52 feet. It will be noted that the clamps shown for holding the mesh to the framework are of 1/8″ material. Thinner material may be used provided the equivalent stiffness is obtained through some modification in the designs shown. * * *

A copy of this contract, including the drawings (plaintiff's Exhibit 2), is by reference made a part of this finding.

14. At least one of the structures purchased by the United States under contract #CC–2646 (plaintiff's Exhibit 2) was manufactured for the United States by the Blaw-Knox Company and used by the United States subsequent to April 4, 1938, and prior to November 22, 1938, the filing date of the petition in this case. This structure is illustrated in





Alleged Infringing Structure.

plaintiff's Exhibits 19 to 21, inclusive, which are by reference made a part of this finding, plaintiff's Exhibit 20 being reproduced herewith for the purpose of illustration.

The antenna comprises a vertical metallic tower, pyramidal in shape and of approximately square cross-section, mounted on a concrete base extending two feet above the ground surface.

An insulator is interposed at each of the corner legs of the tower and a center strain insulator is provided, all of which insulators function to insulate the radiating portion of the tower from the earth. These insulators are located in a plane eight feet above the concrete base of the tower, and ten feet above the ground.

A conventional buried ground system comprising wires extending radially in all directions from the tower is associated with each tower and is connected to the grounded side of the exciting means for the tower.

A metal framework supports a horizontal reticulated metal netting or screen, which is positioned approximately two feet below the insulators and eight above the surface of the ground. This screen is approximately fifty feet square, the length of each side thereof being approximately eight times the length of each side of the base of the tower, the spacing of the tower legs being six feet. This screen is grounded by being electrically connected to the buried ground system at the center and at the periphery of the screen.

15. The ground screen as used in the Government structures possesses the dual function of providing a uniform electrostatic capacity for each tower, regardless of varying heights of snow or vegetation in the vicinity of the tower, and for reflecting energy which would be normally lost in the absence of such screens, and returning it to the tower.

16. The terminology of claim 4 of the patent in suit is applicable to the Government structure.

17. Claims 5 and 7 of the patent in suit contain phraseology specifying a definite relationship or location of the screen with reference to the insulators. These claims are in accord with the illustrated embodiment of the invention as shown in the drawings of the patent in suit, in which

the ground screen is mounted against the brackets at the lower end of the insulators. For convenience, these claims are herewith repeated, with the limiting phraseology italicized:

5. In a radiating tower antenna, a base support, insulators mounted on said support, and a condenser formed by metallic members on the opposite ends of said insulators comprising a grounded electrically conducting metallic plate *disposed on the ends of the insulators closer to the ground* and a metallic tower structure disposed above said insulators.

7. In a radiating tower antenna, a base support, insulators mounted on said support, and a condenser formed by metallic members on the opposite ends of said insulators comprising a grounded electrically conducting metallic plate member *disposed* in a plane substantially perpendicular to the axis of said tower *on the ends of the insulators closer to the ground* and a metallic tower structure disposed above said insulators.

18. The phraseology of claims 5 and 7 is not applicable to the Government structure in which the screen is located two feet below the insulators.

PRIOR PATENTS AND PUBLICATIONS

19. The prior art cited by the Patent Office during the prosecution of the application which matured into the patent in suit is as follows:

U. S. Patent No. 767,974, issued August 16, 1904, to John Stone Stone, plaintiff's Exhibit 7–A;
U. S. Patent No. 1,647,283, issued November 1, 1927, to Abraham Esau, plaintiff's Exhibit 7–E;
U. S. Patent No. 1,694,135, issued December 4, 1928, to Alexander Meissner, plaintiff's Exhibit 7–F;
U. S. Patent No. 1,747,027, issued February 11, 1930, to Ernest Y. Robinson, plaintiff's Exhibit 7–D;
U. S. Patent No. 1,752,864, issued April 1, 1930, to Laurens A. Taylor, plaintiff's Exhibit 7–C;
U. S. Patent No. 1,783,072, issued November 25, 1930, to Henri Chireix, plaintiff's Exhibit 7–G;
U. S. Patent No. 1,839,426, issued January 5, 1932, to Graf G. von Arco et al., plaintiff's Exhibit 7–B;
U. S. Patent No. 1,963,014, issued June 12, 1934, to Roy W. Brown, plaintiff's Exhibit 7–H; and
British Patent No. 338,982, issued December 1, 1930, to H. L. Kirke, plaintiff's Exhibit 7–I.

Copies of these patents, as enumerated above, are by reference made a part of this finding.

20. In addition to the art cited by the Patent Office during the prosecution of the patent in suit, the following patents and publications were available to those skilled in the art on the respective dates indicated:

U. S. Patent No. 706,746, granted August 12, 1902, to R. A. Fessenden, defendant's Exhibit 57–A;

U. S. Patent No. 693,651, granted July 4, 1905, to R. A. Fessenden, defendant's Exhibit 57–B;

U. S. Patent No. 1,929,845, granted October 10, 1933, on an application filed September 29, 1930, to S. C. Haynes, defendant's Exhibit 57–G;

U. S. Patent No. 1,937,964, granted December 5, 1933, on an application filed April 6, 1932, to R. L. Jenner, defendant's Exhibit 57–I;

Principles of Wireless Telegraphy, by George W. Pierce, published 1910, pages 316, 317, defendant's Exhibit 57–C;

Wireless Telegraphy, by Bernard Leggett, published 1921, defendant's Exhibit 57–D;

Radio Telephony for Amateurs, by Stuart Ballentine, published 1922, pages 33 to 36, and 58 to 90, inclusive, defendant's Exhibit 57–E;

Admiralty Handbook of Wireless Telegraphy, published 1925, pages 432, 433, defendant's Exhibit 57–F;

Air Commerce Bulletin, published July 15, 1932, pages 33 to 45, inclusive, defendant's Exhibit 57–J; and

Specifications Nos. 555 and 556, published March 3, 1932, defendant's Exhibits 57–K and 57–L, by the Department of Commerce, Aeronautics Branch, Lighthouse Service Airways Division.

Copies of these patents and publications, as enumerated above, are by reference made a part of this finding.

21. The following prior art patents relate to and disclose radio antenna of the self-supporting tower type:

U. S. Patent to Brown, No. 1,963,014, issued July 12, 1934, plaintiff's Exhibit 7–H;

U. S. Patent to Haynes, No. 1,929,845, issued October 10, 1933, defendant's Exhibit 57–G;

U. S. Patent to Jenner, No. 1,937,964, issued December 5, 1933, defendant's Exhibit 57–I.

These patents all disclose a radio antenna tower of the self-supporting type comprising a plurality of upright members

interconnected or braced by rigid structural members, the towers being of pyramidal form with the lower ends thereof insulated from the earth by insulators.

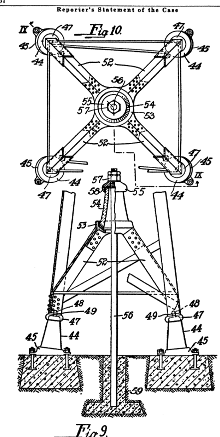
None of the patents refer to any particular form of ground to be used in connection with the antenna, this portion of the transmitting system obviously being left to the choice of those skilled in the art.

Figures 9 and 10 of the patent to Jenner are reproduced herewith. This tower as shown is of rectangular cross-section at the base and is provided with insulators 44 in each of the four legs and a central or strain insulator 54 in the center of the tower. The particular type of pyramidal self-supporting tower shown in these figures and disclosed in the Jenner patent is substantially the same as the antenna tower used in the Government structures.

22. U. S. Patent to Stone No. 767,974, issued August 16, 1904 (plaintiff's Exhibit 7-A), sets forth in the introductory portion of the specification that effective radiation of radio waves from an elevated conductor can be increased by "artificially increasing the natural electrical conductivity of the surface of the earth or other natural media in the immediate vicinity of the base of the transmitting-wire and maintaining said surface in a constantly-conducting state."

The specification contains the following disclosure with reference to accomplishing the desired effects:

> For making the surface of the earth more highly conducting and maintaining it in a constantly-conducting state a multiplicity of substances may be used. In the drawing I have illustrated one embodiment of my invention in which metallic wire-netting of large mesh, known as "chicken-coop" netting, is placed in electrical contact with the earth surrounding the lower end of the elevated conductor and is connected to the lower end of said conductor. Such netting has been used successfully for the purpose herein specified. I have also used a layer of commercial calcium chlorid, although any other deliquescent salt which by virtue of its moisture-absorbing properties will maintain the surface of the earth in a constantly-moistened condition may be used, and a layer of such salt may with advantage be spread upon the earth within the area covered by the wire-netting. A solution of water and any conducting salt may be used.



Jenner patent.

The drawing of the patent, which is reproduced herewith, is illustrative of the means whereby the conductivity of the surface of the earth in the neighborhood of the base of the antenna is increased.

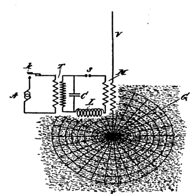
No. 767,974. PATENTED AUG. 16, 1904.

J. S. STONE.

APPARATUS FOR INCREASING THE EFFECTIVE RADIATION OF ELECTROMAGNETIC WAVES.

APPLICATION FILED OCT. 30, 1903.

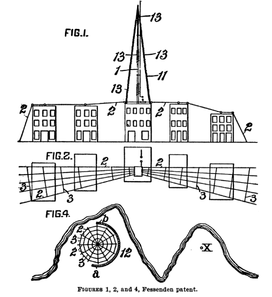
NO MODEL.



With reference to the size of the conducting surface or netting to be utilized the specification states as follows:

> Although it is indicated by theory that any means employed to increase the natural electrical conductivity of the earth should extend from the base of the elevated conductor a distance equal to a quarter-wave length of the transmitted wave, it is to be distinctly understood that this length is merely the maximum length which may be advantageously employed, while excellent results

may be obtained by using a much shorter length. In other words, the area of the netting or system of wires or other means specified herein may be much smaller than the area of a circle whose radius is equal to a quarter-wave length of the transmitted wave, although better results are obtained as this area is approximated.



FIGURES 1, 2, and 4, Fessenden patent.

23. The U. S. Patent to Fessenden 706,746, issued August 12, 1902 (defendant's Exhibit 57–A), Figs. 1, 2 and 4 of which are reproduced herewith, discloses a vertical antenna having an artificial ground composed of a highly conducting surface extending outwardly from the antenna and located at the base thereof.

As disclosed in the figures reproduced, the artificial ground consists of a plurality of radial wires laterally connected by other wires in the form of a spider web, the radial wires being grounded at their extremities. In connection with this disclosure the patentee states:

> I have found that it is essential for the proper sending and receipt of these waves that the surface over which they are to travel should be highly conducting. more especially in the neighborhood of the point where the waves are generated. I have found that this highly conducting portion of the surface should preferably extend to at least a distance from the origin equal to a quarter wavelength of the wave in air and in the direction toward the station or stations to which it is desired to send the waves. Where the sending station is in a city or similar place where the waves may be cut off by high buildings or high trees, this highly conducting path should be extended still farther until it passes beyond the limits of the obstacle, and there the highly conducting portion, which may be in the form of a strip of metal or other conductor or of a number of wires, is connected to ground. This arrangement may be called a "wave-chute."

Figs. 1 and 2 disclose the arrangement of radio conductors in connection with the high buildings discussed, *supra*, by the patentee, and Fig. 4 discloses an artificial ground extending uniformly in every direction, Fig. 4 being referred to in the specification "as a plan view showing arrangement of station on rocky shore or other nonconducting ground."

The function of the ground system disclosed by the patent is stated in the specification as follows:

> Another very important function of the construction here described is that it enables the capacity and self-induction of the sending-station to be maintained constant, which is of fundamental importance in working tuned circuits. It frequently happens that stations are situated on rocky portions of coast where salt spray sometimes dashes up and renders portions of the ground-surface near the station conducting which were previously insulating, hence changing the capacity and inductance of the sending-conductor. If, however, the surface be covered by the network or strips heretofore described, the capacity will not be changeable, but constant, as the surface near the station is maintained in

a constantly-conducting state. Hence the stations once tuned will not be put out of tune by changes of weather or other disturbances.

24. The Admiralty Handbook of Wireless Telegraphy, published in 1925 (defendant's Exhibit 57–F), describes in Section 584 what is referred to as "the earth screen." As illustrated in Fig. 336 of this publication, which is reproduced herewith, the earth screen is shown in connection with a vertical antenna having a flat top section.

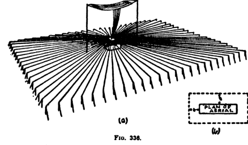


FIG. 336.

Section 584 reads in part as follows:

* * * * *

The function of the screen is to intercept the lines of force from the aerial to earth and to carry the return current on the screen wires rather than by the earth.

Further, when the earth system is placed on or in the earth, heavy eddy current losses occur in the earth, owing to its poor conductivity.

When the earth system is raised up, as in the "earth screen," these losses are reduced.

The earth screen should extend on all sides beyond the area covered by a plan view of the aerial system by a distance equal to the height of the aerial.

The wires composing it should not be spaced closer than a distance three times the height of the screen above the ground.

At certain Naval Stations good results have been achieved by earthing the outer edges of the earth screen.

In this arrangement, the ground screen comprises metallic wires which are concentrated or spaced relatively close together directly below the vertical portion of the antenna, where the field is most intense. The description as quoted above also instructs those skilled in the art that the outer edges of the earth screen may be grounded. The earth screen herein disclosed constitutes a metallic surface upon which the lines of force from the antenna may terminate, thereby preventing the penetration of these lines of force into the earth, within the area of the more intense and concentrated field.

25. The book "Wireless Telephony" by Bernard Leggett, published in 1921 (page 82, defendant's Exhibit 57-D), after referring to a number of types of top-loaded vertical antennas, discloses the then prevailing practice for forming a metallic surface surrounding the base of the antennas for the portable transmitting stations of the British Army. The pertinent portion of this publication reads as follows:

> A counterpoise is often used as with land stations, by means of a system of wires supported by the mast or masts at a height of about 7 feet, i. e., just sufficient to prevent a man from striking them with injury to himself and them.
>
> The British Army stations usually make use of "earth mats" either with or without a counterpoise of wires. These consist of copper gauze rolls about 1 yard wide and 10 yards long, connected together and to the earth terminal of the wireless station and just unrolled out upon the ground. If the location is dry, they doubtless act as a counterpoise chiefly by capacity effects, whereas if the location is damp (they are preferable intentionally made wet by pouring water on them) they act as a true earth.
>
> This gives a rapid means of "earthing" together with an earth of constant properties.
>
> The number of such earth mats may vary, and they are usually arranged symmetrically around the wireless stations. * * *

This publication discloses to a man skilled in the art an approximate equi-potential metallic surface approximately 30 feet square beneath the antenna.

In this construction the lines of force from the lower portion of the antenna terminate upon the earth mats, which form a low loss metallic connection to the ground lead of the generator contrasted to earth itself, and thereby prevent the penetration of these lines of force into the earth with its attendant losses within the area of the concentrated field.

26. The publication "Principles of Wireless Telegraphy" by George W. Pierce, published in 1910 (defendant's Exhibit 57-C made a part hereof by reference), pages 316 and 317, describes various devices which may be resorted to for obtaining "a satisfactory ground." These are (1) connection to the pipes of a water supply; (2) connection to a buried network of wires supplemented if desired by metallic pipes driven into the earth or *supplemented* by wire netting spread on the surface of the earth. The pertinent portion of this section reads as follows:

> In practice, for a small station a satisfactory ground can be obtained by a connection to the pipes of a water supply. Where this is lacking, a good arrangement is to bury a netting or network of wires at a short depth below the surface of the earth. This may be supplemented by metallic pipes driven to considerable depths into the earth, and also by wire netting spread out on the surface of the earth. When the station is located near the sea or other body of water, the wire netting or wires provided with terminal plates may be led into the body of water. On board ship, the grounding is usually effected by a heavy wire attached to the metallic hull of the ship. In the high-power land stations, netting and wires are made to ramify the surface of the earth for many acres.

This publication discloses to a man skilled in the art a ground system comprising a network of wires buried at a short distance below the surface of the earth *supplemented* by wire netting spread out on the surface of the earth to form an equi-potential surface to reduce ground losses in the antenna system.

27. The publication "Radio Telephony for Amateurs" by Stuart Ballantine, Second Edition, copyrighted 1922 (defendant's Exhibit 57-E made a part hereof by reference),

contains a rather complete discussion of problems involved in radio transmission and suggests certain solutions therefor.

In the chapter beginning page 58 entitled "Antenna Construction," the publication refers to various types of antenna and ground systems therefor.

Under paragraph 18 of the publication entitled "Requirements for Transmitting," the various losses of energy are listed, and included in the listing, as items 3 and 4, are the following:

> 3. Loss due to heat developed in the earth (earth resistance) by currents returning to the lead-in.
> 4. Loss due to imperfect dielectrics in the electric field of the antenna.

The publication then takes up in detail the consideration of the various losses set forth, and in Section 22, which is entitled "Losses Due to Earth Currents," enters into a rather complete discussion of these losses and means for reducing them to a minimum. Paragraph 22 reads in part as follows:

> The third source of loss, usually the most prolific in antenna systems, especially at short wavelengths, is the heat generated in the earth by the currents returning to or coming from the lead-in. Remembering that the heat loss is equal to I^2R, it is clear that the loss in any unit cube of the earth material goes up as the *square* of the current density at that point; consequently in order to keep down the whole loss the *concentration of current at any point* is to be avoided. The distribution of current depends upon the wavelength, conductivity, and dielectric constant of the earth, as well as upon the geometry of the antenna.

The above quotation is indicative of the fact that the *conductivity* and *dielectric constant* of the earth were both recognized in the prior art as affecting the distribution of current.

The paragraph further states—

> The current converges toward the lead-in and the current density is therefore greatest at this point. In the antenna system, the current flows by a conductive path up through the antenna conductors, thence by capacity paths to the earth, and finally through the earth to the lead-in. It is precisely the concentration of current here that causes most of the loss in the average grounding

system. The loss may be diminished by reducing the current concentration, and this may be accomplished by providing a generous surface in the grounding electrode.

28. Section 23, entitled "Direct Ground," describes a type of ground known in the art as "Round's Round Ground." As described, this consists of a ground electrode comprising a short circular cylinder of large radius with its lower edge buried in the earth, a depth of two or three feet being suggested for earth of not too poor conductivity and for wavelengths of from 200 to 300 meters. The section goes on to state—

> The connection is made by means of a number of wires which converge to the approximate center of the circle and unless the cylinder is very deep, and in any case if it is more than 15 feet in radius, should be supported above the earth and not buried in it or laid upon the surface. The cylinder itself may be made up of galvanized-iron sheets, such as are used in the construction of small temporary shacks. These need not be soldered together, but should overlap with no sharp edges protruding any distance from the body of the cylinder. A connection should be made to each sheet. They are better soldered, however, if it can be done. The ground is installed by digging a narrow circular trench under the antenna, not too far from the point at which the lead-in in the antenna diagrams, Figs. 45, 46 and 47, enters the earth. While it is not strictly necessary that the cylinder should be circular, this is the best form and no extreme departures which are likely to introduce sharp corners should be made.

This section of the publication discloses to those skilled in the art a ground screen comprising a plurality of radiating wires extending from a common central point under the antenna and not too far from the point at which the lead-in of the antenna enters the earth, these radiating wires being grounded at their ends or at the periphery of the circular area covered thereby.

29. Sections 24 and 25 discuss what is known in the art as the "counterpoise," and these sections are illustrated by Figs. 53 (*a*) and (*b*) and Fig. 54, all of which are reproduced herewith.

Section 24 reads in part as follows:

Lay upon the earth a large metal disc and connect this to the lead-in [Fig. 53 (*a*)]. The currents will now find a large conducting surface and on account of the large area and circular shape of the plate a fairly low resist-

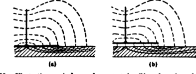


Fig. 53.—Illustrating equivalence of counterpoise (b) and surface electrode (a) in securing more uniform distribution of earth currents.

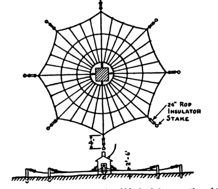


Fig 54.—Model counterpoise system in which the design suggestions of this article have been incorporated.

ance ground will be obtained. There will probably be a slight concentration of current at the edges. This would make a very good ground and could be still further improved by extending its edges down into the earth as in the cylindrical ground system just described. The plate need not be on the surface, but may be supported

above it as shown at (*b*), Fig. 53. The current flow is practically unaffected by this change and is completed through the condenser formed by the disc and the earth's surface. This system is found experimentally to yield a very low ground resistance, as the above reasoning would lead us to expect. From a practical point of view, however, a metal plate of this size is inconvenient and expensive. The advantages of the arrangement are not lost nor materially diminished if a net of wires is substituted for the plate, *provided* the wires of this network are sufficiently plentiful and they are not too far apart compared with the distance above the earth. Such an arrangement (*b*), Fig. 53, is called a *counterpoise* or *capacity ground*, and if properly designed and installed, is the most desirable and satisfactory type of ground for the amateur, especially in localities where the earth conductivity is poor.

Section 25 relates to the construction of the wire counterpoise, and the pertinent portions of this section are as follows:

> The *area* of the counterpoise should be as large as possible since the distribution of earth currents is directly affected thereby. The exact shape is not generally important, but the best forms are the circular, elliptic, square and rectangular, in the order given. It should be placed as nearly under the antenna as possible and should extend well out beyond the antenna's projection on the earth. The *number of wires* should be as large as possible and the wires should be frequently bound together with cross jumpers. This will reduce to a minimum the generation of heat due to current vortices which form as a result of its possibly irregular shape and situation. The *height* of the counterpoise is governed by several considerations, the most important of which are the separation of the wires in the network, the evenness of the ground, the character of the vegetation with which it is covered, its conducting qualities, and the possible presence of ground water near the surface. If the height is small compared with the distances between the wires in the net, there will be a tendency for concentration of the current immediately under the wires. * * * Bushes, grass, and other flora under the counterpoise constitute poor dielectrics and in order to make the volume of dielectric which they represent as small as possible compared with the total dielectric, the height of the counterpoise should be increased when they are present. A similar remark holds for any type of poor dielectric. * * *

The above precautions and desirable features have

> been incorporated in the design of a typical counterpoise system shown in Fig. 54. This may serve as a model in planning a counterpoise for any special situation. More detailed specifications would be of no particular value on account of the wide variation of conditions likely to be encountered by the readers of these pages. For fairly even ground covered with short grass, a height of 2 or 3 feet will be adequate; for uneven ground or ground covered with bushes and undergrowth, heights two or three times this will be necessary for best results.
>
> * * * The only way to ground the counterpoise would be to bury a circle of plates at its periphery, thus making a very large direct ground of the type described in the last section. * * *

30. Sections 24 and 25 of the Ballantine publication disclose to those skilled in the art a ground screen or shield composed of a network of wires and located as nearly under the antenna as possible, elevated above the surface of the ground from a minimum of from two to three feet to a maximum of six to nine feet depending upon the character of vegetation underneath the screen, the screen being grounded at a multiplicity of points at its periphery.

The disclosed function of such a screen is to provide a low resistance metallic surface underneath the antenna for the purpose of shielding the antenna from dielectric losses, preventing an intense electric field from existing at the surface of the ground, and reflecting or returning energy to the antenna which otherwise would be normally lost.

31. In Section 33 of the Ballatine publication the author discusses the antenna systems located on the roofs of houses. This section states in part as follows:

> The chief disadvantage of these systems is that a great deal of material, dielectric and conducting, is directly under the antenna, in the most intense part of its field. The resulting dielectric and other losses will therefore generally be quite high. In the case of a house with a tin roof well bonded together electrically, there is sometimes an advantage in grounding the tin at its four corners, or in as many places as possible, by running a separate lead from each point of connection directly to the ground. The grounding of these leads should be well done; otherwise the supposed advantage may be turned into an increased loss. The ground-lead from the trans-

> mitting apparatus may then be connected to the tin roof. The effectiveness of this scheme increases with the amount of load in series with the antenna. This should not, however, be construed to mean that the antenna should be operated above its fundamental. Figure 63 illustrates this type of installation.

This section of the publication discloses and suggests to those skilled in the art that the metallic roof of a building may be grounded at a multiplicity of points at its periphery, thus establishing a metallic screen below the antenna upon which the lines of force from the antenna may terminate, thereby preventing dielectric and other losses which would otherwise occur.

PRIOR USES

32. Broadcasting station WAVE of the National Broadcasting System is located at the Brown Hotel, Louisville, Kentucky. This station was erected in 1933 and has been operating in regular commercial daily broadcasts from December 30, 1933, until at least as late as May 11, 1939.

The antenna is located on the roof of the hotel, which is about 180 feet above the ground. The antenna comprises a single vertical self-supporting, four-cornered pyramidal tower 209 feet in height, insulated at its base from the supporting steel framework by means of porcelain insulators.

The hotel is of structural steel and brick construction and the roof is a concrete slab with asphalt covering. A roof screen was installed at the time of erection of the antenna tower in 1933, the same comprising approximately forty copper strips one thirty-second of an inch thick by two inches wide laid radially on the roof and radiating outwardly from a center beneath the base of the tower to the edges of the roof, covering an area approximately 45 feet by 75 feet. These strips were connected to the grounded water pipes of the building, the copper flashing of the roof, and to all metallic pipe systems in the building.

The radial strips were tied together by lateral strips of the same size at intervals, and metal plates, each approximately 3½ feet square, were laid beneath each corner of the tower-supporting members, the edges of these sheets be-

ing approximately nine feet apart. These sheets were also connected or bonded to the radial strips.

This roof screen was for the purpose of increasing the radiation efficiency of the antenna and returning to the antenna, or tower, energy which would otherwise be lost, were the screen not present.

The antenna and the roof screen installation at the Brown Hotel is open to the inspection of the public and it has been the custom of guests of the hotel and guests of the roof garden to have access to the roof, a picket fence being built around the base of the tower to prevent members of the public from coming in contact with high-tension portions of the tower.

While the radial strips are partially covered with asphalt or roofing compound, their presence and use as a ground screen are apparent to those skilled in the art, as shown in a series of photographs (defendant's Exhibits D-19 to D-24, inclusive), which are by reference made a part of this finding.

33. Broadcasting station KSO was erected on the roof of the Register and Tribune Building, a 13-story structural steel reenforced building in Des Moines, Iowa. This station was completed and in regular broadcasting service as a part of the National Broadcasting System from November 5, 1932, until October 3, 1935, when the station was moved to another location.

The antenna, which was located on the roof of the building, comprised a single vertical self-supporting four-cornered pyramidal tower approximately 154 feet high mounted on a steel framework of I-beams, the base of the tower being insulated therefrom by means of four corner insulators approximately two feet above the roof. The concrete roof on which the antenna tower was placed was approximately 65 feet square.

The ground system of the antenna included a mesh or net of copper wires laid directly on the roof, the wires being spaced from 18 to 24 inches apart and bonded to each other at the points of intersection and to all metal parts on the roof.

Strips of wire mesh, known as fox wire or chicken wire, approximately 30 feet long, were laid upon the roof directly

under the vertical tower and extending outwardly in various directions therefrom. These strips were bonded together and also bonded to the copper wires.

The wire network and the fox wire strips were covered with a coating of tar and pebbles, this covering, however, being so thin that the fox wire was visible in places, as indicated in a photograph taken on or prior to March 1, 1933 (defendant's Exhibit 13), which is by reference made a part of this finding.

The fox wire strips were visible to a sufficient extent to show the use of a ground screen located under the antenna tower.

While not accessible to the general public, the antenna and ground system employed at KSO was available for inspection on request of interested individuals, such as radio engineers and those associated with engineering schools, and such inspections were made on various occasions.

34. Broadcasting station WKRC was erected on the roof of the Alms Hotel at Cincinnati, Ohio. The antenna system as erected and placed in operation in the fall of 1933 comprised two Blaw-Knox self-supporting type narrow base steel towers 154 feet high insulated at the base, the insulators resting upon frameworks of steel beams.

Upon the roof and under the base of each tower there was provided a #10 mesh copper screen extending some four feet beyond the steel work of the tower foundation on all sides, except where the parapet roof wall occurred. These screens each contained approximately 500 square feet of material. They were connected to each other by a copper strip running across the roof of the hotel between the two towers, and the screens and strip were further connected to the building framework and to water and ventilator pipes of the building, as well as to a buried ground network at the base of the building.

Station WKRC began commercial operations as a part of the Columbia Broadcasting System in the fall of 1933 and has been operating ever since, with the exception of a short period during the summer of 1934 when a heavy storm damaged the vertical towers, which had to be replaced.

The ground screens used in conjunction with these towers were laid directly upon the roof, and, with the exception of a few weeks during the constructional period, were covered by a coating of roofing paper and roofing compound which entirely concealed them. The presence or use of these screens would not be apparent to anyone inspecting the transmitting equipment of this station.

The screens of station WKRC were specified by the Columbia Broadcasting System, the owner of the station, and were installed in accordance with its specifications, which specifications are in evidence as defendant's exhibit 51–D made a part hereof by reference. The screens were used uncovered for a period of some weeks after they were installed and were then covered with roofing paper and asphalt, not for the purpose of concealing their use, but simply for the purpose of protecting the screening.

There has never been any occasion to or any attempt in suppression or concealment of facts or of the use of the screens from the public. The covering above-mentioned made no difference in the functioning of the screen.

35. The prior art and use referred to in Findings 22 to 34, inclusive, indicate that prior to any effective dates of the Schuler invention those skilled in the art had knowledge—

(a) That both the conductivity and dielectric constant of the earth affected the distribution of current adjacent the antenna, and that a loss of energy was likely to occur by the penetration of the lines of force through the earth to a buried ground system;

(b) That a variation in the pattern of the radiated waves from the antenna would be caused by variations of conductivity in various portions of the ground under or adjacent to the base of the antenna;

(c) That a metallic ground screen located under the antenna, elevated above the surface of the ground, and grounded at various points in its periphery, would function to reduce the effects set forth in items (a) and (b) and would therefore return or reflect energy to the antenna which would otherwise be lost.

36. The beneficial effect of ground screens located at the base of the antenna was well known to those skilled in the

art, and to utilize such a ground screen in connection with a pyramidal tower antenna such as is disclosed in the prior art (see Finding 21) would not produce any novel or unforeseen result and would not involve invention.

Claim 4 in issue is invalid.

37. If claims 5 and 7 are so interpreted as to disregard the specific limitation contained therein as to the ground screen or metallic plate member being located on the "*ends of the insulators*," these claims will be invalidated in view of the prior knowledge and use of ground screens located at the base of the antenna.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, Judge, delivered the opinion of the court:

In view of the facts clearly established by the evidence of record, which facts so far as pertinent to the questions of validity and infringement now before the court are set forth in the findings, we are of opinion that claim 4 of the patent in suit is invalid under the prior art; that claims 5 and 7 as specifically limited are not applicable to the alleged infringing structure, and that if these claims are so interpreted as to disregard the specific limitation contained therein they, also, will be invalid in view of the prior knowledge and uses (findings 35, 36, and 37).

Claims 4, 5, and 7, which plaintiff alleges have been infringed by the defendant, are set forth in finding 9. These claims relate particularly to a ground screen used in connection with a radio broadcasting tower or antenna for reflecting electrical energy, which would be normally lost in the absence of such screen, and returning it to the tower. The disclosures of the patent in suit are set forth in finding 8. The description of the alleged infringing radio broadcasting tower and ground screen manufactured for and used by the defendant is set forth in findings 13, 14, and 15. The antenna of the alleged infringing structure comprises a vertical metallic tower, pyramidal in shape and of approximately square cross-section mounted on a concrete base extending two feet above the ground surface. An insulator

is interposed at each of the corner legs of the tower and a center strain insulator is provided, all of which function to insulate the radiating portion of the tower from the earth. These insulators are located in a plane eight feet above the concrete base of the tower and ten feet above the ground.

Associated with each antenna tower is a conventional buried ground system comprising wires extending radially in all directions from the tower and connected to the grounded side of the exciting means for the tower. In addition, a metallic framework supports a horizontal reticulated metal netting or screen which is positioned approximately two feet below the insulators of the tower and eight feet above the surface of the ground. This screen is approximately 50 feet square, the length of each side thereof being approximately eight times the length of each side of the tower, the spacing of the tower legs being six feet. This screen is grounded by being electrically connected to the buried ground system at the center and at the periphery of the screen. This ground screen so used in the Government structure possesses the dual function of providing a uniform electrostatic capacity for each radio broadcasting tower regardless of varying heights of snow or vegetation in the vicinity of the tower and for reflecting energy, which would be normally lost in the absence of such a screen, and returning it to the tower.

The terminology of claim 4 of the patent in suit is applicable to the Government structure. Claim 4 is as follows:

> A wave antenna tower comprising a plurality of upright members interconnected by rigid structural members, said tower being of pyramidal form with the lower base ends thereof insulated from the ground by insulators, and means below said insulators for reflecting energy normally lost and returning it to the tower.

Claims 5 and 7 of the patent in suit contain phraseology specifying a definite relationship or location of the screen with reference to the insulators of the radio antenna tower and the phraseology of these claims as so limited is not applicable to the Government structure in which the alleged infringing screen is located two feet below the tower insulators. These claims are as follows:

5. In a radiating tower antenna, a base support, insulators mounted on said support, and a condenser formed by metallic members on the opposite ends of said insulators comprising a grounded electrically conducting metallic plate *disposed on the ends of the insulators closer to the ground* and a metallic tower structure disposed above said insulators. [Limiting phraseology italicized.]

7. In a radiating tower antenna, a base support, insulators mounted on said support, and a condenser formed by metallic members on the opposite ends of said insulators comprising a grounded electrically conducting metallic plate member *disposed* in a plane substantially perpendicular to the axis of said tower *on the ends of the insulators closer to the ground* and a metallic tower structure disposed above said insulators. [Limiting phraseology italicized.]

If the specific limitation of these claims that the ground screen or metallic plate be "disposed on the ends of the insulators closer to the ground" is interpreted to mean only that the screen or plate be placed below the tower insulators, the phraseology of these claims would be applicable to the Government structure.

As set forth in finding 8, the patent in suit discloses a conventional vertical radiator in the form of an antenna tower, rectangular in shape, formed of structural steel members and girders having a relatively broad base tapering to a narrow top. The entire structure is provided with a plurality of insulators at the base of each leg of the tower. Mounted upon each end of the insulators there is a shield or screen which functions as a condenser. The entire system is supported above ground on a foundation structure. Screen 6, fig. 1, finding 8, with which this suit is concerned, is connected at a multiplicity of points along its boundary or edges by leads to a conventional buried ground system which, as stated in the patent, may be either radial or a grid of wires. Such a screen is known in the art as a grounded counterpoise and was claimed as such during progress of the application resulting in the patent in suit. The drawings of the patent give no indication of the extent of the ground system, except that it was substantially co-extensive with the ground screen. The specification gives no indication

of the extent of this ground system, other than it is a conventional one. There is no indication in the patent of the height of the base for the tower, nor the elevation of screen 6 above the surface of the earth, other than the statement in line 50, page 1, of the patent that "this screen being placed slightly above the surface of the ground, shields and prevents the intense electric field from existing at the surface of the ground." The testimony of plaintiff's witnesses, including that of the patentee, with respect to the elevation of the screen above ground is that the screen will function properly if laid "right on the surface of the ground" and that the distance of the screen above the ground is not of any importance as long as the screen is above the ground.

None of the claims in suit specify the exact manner in which the screen or counterpoise is grounded, the height the screen or counterpoise is above the surface of the earth, or the size or configuration of the screen or counterpoise, or the character of materials employed in the construction of the screen or counterpoise.

A consideration of the prior patents, publications, and uses described and discussed in findings 21 to 34, inclusive, shows that the principle and purposes with which the patent in suit deals were fully described and disclosed in patents and publications antedating the patent in suit. These prior patents, publications, and the prior uses set forth in findings 32 to 34, inclusive, disclosed and employed means for meeting and overcoming the problem of loss of energy around the base of a radio antenna tower in a way and by means identical with the means described and claimed in the patent in suit. They accomplished the same result. When tested by these disclosures it is clear, we think, that the patent in suit does not disclose or claim any new or novel device or means involving invention. Sections 4920 and 4886, R. S.; *Smith* v. *Nichols*, 21 Wall. 112; *Union Paper Bag Machine Co.* v. *Murphy*, 97 U. S. 120; *Bates* v. *Coe*, 98 U. S. 31; *Cantrell* v. *Wallick*, 117 U. S. 689; *Morley Sewing Machine Co.* v. *Lancaster*, 129 U. S. 263; *Eibel Process Co.* v. *Minnesota & Ontario Paper Co.*, 261 U. S. 45.

It is clear from the record that the claims of the patent in suit, as interpreted by plaintiff's witness, if antedating

the patents, publications, and uses set forth and described in the findings would be infringed by radio antenna towers and ground screens constructed in accordance with the disclosures and directions in the other patents, publications, and the screens actually used. Inasmuch, however, as these other patents, publications, and uses antedated the patent in suit, it is invalidated, because that which would infringe if later will anticipate if earlier. *Peters* v. *Active Manufacturing Co.*, 129 U. S. 530; *Knapp* v. *Morse*, 150 U. S. 221; *Miller* v. *Eagle Manufacturing Co.*, 151 U. S. 186. The proof shows that the radio antenna ground screen claimed in the patent in suit is the same, or substantially the same, as ground screens previously described and used, and that it performs the same function in the same way to obtain the same result. *Roberts* v. *Ryer*, 91 U. S. 150; *Sewall* v. *Jones*, 91 U. S. 171; *Burt* v. *Evory*, 133 U. S. 349; *Brown* v. *Davis*, 116 U. S. 100; *Egbert* v. *Lippmann*, 104 U. S. 333, 336; *Electric Storage Battery Co.* v. *Shimadzu et al.*, 307 U. S. 5, 20.

The facts further established by the record clearly show that prior to the effective date of plaintiff's invention those skilled in the art had knowledge that both the conductivity and dielectric constant of the earth affected the distribution of current adjacent to the radio antenna and that loss of energy was likely to occur by penetration of the lines of force through the earth to a buried ground system; that a variation in the pattern of the radiated waves from the antenna would be caused by variations of conductivity in various portions of the ground under or adjacent to the base of the radio antenna tower; and that a metallic ground screen located under the antenna, elevated above the surface of the ground, and grounded at various points in its periphery, would function to reduce the above-mentioned effects and would therefore return or reflect energy to the antenna which would otherwise be lost. The proof further establishes that the beneficial effect of ground screens located at the base of the antenna was well known to those skilled in the art and that the utilization of such a ground screen in connection with a pyramidal tower antenna, such as is disclosed in the prior art (finding 21) would not pro-

duce any novel or unforeseen result and would not involve invention.

For these reasons, claim 4 of the patent in suit is invalid.

Claims 5 and 7, as specifically limited by the language thereof, as heretofore mentioned, have not been infringed by the defendant but if they are so interpreted, as plaintiff contends they should be, as to disregard the specific limitation that the ground screen or metallic plate member be located *on* the ends of the insulators, they are, likewise, invalid in view of the prior knowledge and use of ground screens located at the base of the antenna. The plaintiff cannot assert a broad construction of its claims in order to make out a case of infringement, and then narrow them so as to avoid anticipation. *White* v. *Dunbar*, 119 U. S. 47, 51, 52; *Smith* v. *Hall*, 301 U. S. 216, 232.

Plaintiff is not entitled to recover and the petition is dismissed. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

COLUMBIA HALEY DOONER, ANGELA HALEY KEELEY, MADELINE HALEY, GENEVIEVE HALEY, MARGARET HALEY, PAUL C. HALEY, JOHN P. HALEY, WILHELMINA HALEY, MARY HALEY, MARTHA HALEY MUSSER, AND ROBERT M. HALEY, AN INFANT, BY WILHELMINA HALEY, HIS MOTHER AND NEXT FRIEND, v. THE UNITED STATES

[No. 44489. Decided January 5, 1942]

On the Proofs

Taking of private property for public use; completion by United States Government of project begun by State of Illinois.—Where plaintiffs were the owners of a tract of land in the State of Illinois, lying between the Illinois-Michigan Canal and the Des Plaines River, abutting on the Jefferson Street bridge and extending from the western end of said bridge northward

and at right angles to the bridge along the canal; and where plaintiffs' predecessors in ownership had erected on said land a foundation, in contemplation of building a three-story structure, the first floor at the water level for a warehouse, the second floor at the level of the bridge for a store, and the third floor for a dwelling; and where said building planned in 1913 was abandoned; and where the United States Government in 1930 undertook to complete a deep waterway between Lockport, Illinois, and a point on the Illinois River near Utica, Illinois, which the State of Illinois had begun in or about 1919; and where after (but not before) the United States Government undertook to complete said project, the level of the water was raised and plaintiffs' land was permanently submerged; it is *held* that plaintiffs are entitled to recover.

Same.—The valuation of property taken for public purposes is not an exact mathematical process.

The Reporter's statement of the case:

Mr. F. N. Towers for plaintiff. *Mr. Norman B. Frost* was on the brief. *Dent, Weichelt & Hampton* were of counsel.

Mr. L. R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. On March 7, 1906, Patrick C. Haley and his wife, Mary A. Haley, purchased from "The Canal Commissioners" of the State of Illinois the following described real estate in the State of Illinois:

> All that part of the Southeast quarter of Section nine (9), Township thirty-five (35) North, Range ten (10), East of the third principal meridian lying North of Jefferson Street and between the West wall of the Desplaines River and a line two (2) feet East from and parallel to the West face of the East wall of the Illinois & Michigan Canal, having a frontage of twenty-six (26) feet, more or less, on Jefferson Street and extending North therefrom a distance of one hundred and sixty (160) feet, situated in the City of Joliet, County of Will, State of Illinois.

The purchase price of the property was $2,600, and The Canal Commissioners' deed, a quitclaim deed, was recorded on March 23, 1906, as Document 237775, Book 419, page 222, Office of the Recorder of Deeds, County of Will, State of Illinois. The sale was reported by The Canal Commissioners to

the Governor of the State of Illinois as per minutes of the Commission's meeting July 22, 1906. At the time they made the deed, The Canal Commissioners owned the property in fee simple.

2. Plaintiffs are the heirs of Patrick C. Haley and Mary A. Haley, who died in 1928 and 1927, respectively. The name of *Margaret* Haley Musser appears in plaintiffs' petition as *Martha* Haley Musser, but the error has been corrected by agreement of counsel. Plaintiffs, as the heirs of Patrick C. and Mary A. Haley, are the fee simple owners of the parcel of land described in finding 1, hereinafter referred to as the Haley strip. They allege that this land was taken by the United States when it was flooded in the formation of the Brandon Road Pool as a part of the Illinois Waterway.

3. The Haley strip of land lay between the Illinois-Michigan canal and the Des Plaines River, abutting on the Jefferson Street Bridge and extending from the western end of the bridge northward and at right angles to the bridge along the Canal. There was a narrow earth embankment between the canal and the Haley land. As the Haley strip was eight to ten feet below the level of the floor of the bridge, there was no actual physical access from the land to the bridge.

4. After the purchase of the property in 1906, Patrick Haley planned the erection thereon of a three-story building, the first floor at the water level for a warehouse, the second story at street level for a store, and the third story for a dwelling. The building was to be connected by a ramp at the street level with the Jefferson Street Bridge.

5. Mr. Haley consulted an architect and structural engineer regarding his plans. A 26′ x 80′ brick foundation was completed, after certain engineering difficulties had been overcome, on or about September 1, 1913, but the proposed three-story building was never completed.

6. On October 16, 1907, the General Assembly of Illinois adopted a resolution proposing an amendment to the Constitution, authorizing it to provide for the construction of a deep waterway or canal to extend from the foot of the Chicago Sanitary Canal, a drainage canal at Lockport, Illi-

nois, emptying into Lake Michigan, to a point on the Illinois River at Utica, Illinois, following in general the Illinois and Des Plaines Rivers from Lockport to Utica; for the erection, equipment, and maintenance of power plants, locks, bridges, dams, and appliances for the development and utilization of the waterway, and the issuance of bonds not to exceed $20,000,000 to be used for the construction of the waterway. The proposed amendment was adopted by vote of the people on November 3, 1908, and proclaimed on November 24, 1908, as separate section 3 to the Constitution of 1870.

7. By act of General Assembly of June 17, 1919, construction of the deep waterway was authorized, and by the same act a $20,000,000 bond issue was authorized for construction of the waterway.

The Department of Public Works and Buildings, among other things, was authorized to prepare plans and specifications for the construction of the waterway; to acquire by donation or purchase all property necessary or incident to the construction of the canal, or by condemnation all property necessary to be taken or damaged for the construction of the canal; to repair, replace, or reconstruct any or all public bridges along the line of such waterway in order to provide safe and suitable navigation along such waterway; to make application to the Federal Government for all necessary permits and to make all contracts and do all acts necessary to carry into effect the powers granted.

By sections 23 and 24 of the act the State was made liable for all damages to real estate or personal property, within or without the radius or zone of the waterway, which should be overflowed or otherwise damaged by reason of the construction, maintenance, and operation of the Illinois Waterway and its appurtenances, and the act provided that all claims for damages to property should be ascertained, determined, and fixed by the Department of Public Works and Buildings and paid out of any monies provided for the payment of such claims.

8. The plans for the Illinois Waterway and all bridges were originated by the State of Illinois. They were approved by the Secretary of War in 1919. Construction was

undertaken by the State under authority of the constitutional amendment of 1908 providing for the bond issue of $20,000,000 and the provisions of the Waterway Act of 1919, referred to in finding 7.

9. The plans contemplated the erection of a series of locks and dams, one of which was to be at Brandon Road, 6 miles below Lockport and 2 miles below Joliet. Since the surface of the pool would be from 1 to 8 feet higher than the streets of the city of Joliet, concrete retaining walls to confine the pool within the desired limits were to be built.

10. By 1930 the state had expended $15,500,000 of the bond issue on the waterway and the work was about 75% completed. The remaining funds, however, were not sufficient to complete the project.

11. By the act of July 3, 1930 (46 Stat. 919, 929), Congress authorized the appropriation of a sum not to exceed $7,500,000 for completing the improvements to the Illinois Waterway, in accordance with and subject to the conditions set forth in the favorable reports of the Board of Engineers upon this matter.

The report recommended, among other things, that the State of Illinois construct the new bridges needed and make all necessary alterations in existing bridges, the bridges not to become the property of the United States and no obligation to be incurred by the United States to maintain, operate, or replace them.

12. Before the United States undertook the work authorized by the act of July 3, 1930, the State of Illinois had done some of the work necessary to create the Brandon Road pool. Thereafter, construction work, except the building of the bridges, was done under the supervision of the United States.

The first work done by the defendant in the vicinity of plaintiffs' property was performed under a contract with Green & Son Company entered into September 11, 1931, to construct a part of the wall of the Brandon Road pool.

The project necessitated the demolition of the old bridge at Jefferson Street and the construction of a new bridge, higher than the old one because of the planned increase in the

water level. Dismantling of the old bridge was begun in April 1932 and the new bridge was completed March 1933.

13. On January 16, 1933, the Brandon Road Lock and Dam were closed by the defendant. The water surface elevation was at that time 527 feet above mean sea level and by February 2, 1933, the pool was completely flooded and the water brought to an elevation of 539 feet, which was to be the normal elevation of the pool. By that time the Haley strip had been completely submerged.

After the pool had been formed, the defendant began the work of excavating the canal bed and embankment at the bottom of the pool, including the Haley property. This work was begun on October 24, 1933, and completed February 19, 1934.

14. There is no record that a claim for damages was ever filed by the Haley heirs with the State of Illinois on account of the flooding and excavating of the Haley strip by the United States. No claim was ever filed with the State of Illinois for damages to the Haley strip by reason of the demolition and reconstruction of the bridges at Jefferson and Cass Streets.

15. All public waters are under the jurisdiction of the Department of Public Works of the State of Illinois. Permits for access from private property to public property are provided for under appropriate regulations. A permit is required in every case and is granted upon application being made therefor by the owner of the property where investigation justifies its issuance. No application for such a permit was made by the Haleys, and no permit was granted.

16. Jefferson Street and Bridge in the City of Joliet, adjacent to which the Haley property was situate, was a heavily travelled thoroughfare, and plaintiffs' property was adapted to commercial use. In 1874 a store had been operated on the property.

From August 6, 1921, to August 6, 1931, an advertising company paid the Haleys as rental for use of the property $40 per annum for billboard privileges.

17. Plaintiffs and their ancestors have remained in undisturbed possession of the property since its purchase in 1906

and have regularly paid the real estate taxes up to the time of its flooding by the defendant. Total taxes so paid amount to $1,650.

18. The canal commissioners of the State of Illinois sold the land in question in this case to the Haleys for substantial, valuable consideration and collected taxes from plaintiffs thereon. The City of Joliet regarded and appraised this property as substantially valuable for commercial purposes, based on the right of access to the bridge. It is not shown whether the taxes paid by plaintiffs, referred to in finding 17, included taxes paid to the City of Joliet.

19. At the time of its flooding by the United States the best use of the property with its probable right of access to Jefferson Street Bridge was commercial. The fair, cash market value of the land was $100 per front foot, or $2,600; the foundation had a valuation of the cost of production, less 20 years' depreciation, of $2,200, making a total value of $4,800.

The court decided that the plaintiffs were entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

Plaintiffs sue to recover the value of land and improvements thereto taken by the defendant by permanently submerging the land in water. The defendant urges, first, that the State of Illinois had taken the land before the defendant came upon the scene, and second, that even if the state had not "taken" the land by its prior activities, it had destroyed all or most of its value before the defendant took it.

The State of Illinois in 1919 authorized by legislation the construction of the Illinois Waterway, a deep waterway between Lockport, Illinois, and a point on the Illinois River near Utica, Illinois, connecting certain drainage canals which flowed into Lake Michigan, the Des Plaines River, and the upper Illinois River which flows into the Mississippi. The necessary approval was obtained from the Secretary of War and construction was begun. The authorized amount of the state bond issue for the purpose was $20,000,-

000.00. By the year 1930, $15,500,000.00 of this amount had been expended, and the balance was not enough to complete the project. Plaintiffs' land had not been directly affected by the state's activities up to that time. It still lay between the old Illinois-Michigan Canal and the Des Plaines River, fronting upon and at right angles to a bridge over the canal and river. If the state project had been abandoned at that time, plaintiffs' land would still have been usable as it had been intended to be used in 1913 when plaintiffs' predecessor had erected a foundation on it, in contemplation of building a three story structure, the first floor at the water level for a warehouse, the second floor at the level of the floor of the bridge for a store and the third floor for a dwelling. Because the building planned in 1913 was abandoned and no building had been contemplated since that time, no permit for access to the bridge had been requested. But the law of Illinois, and common experience, would indicate that a permit could have been obtained if desired.

This was the situation in 1930 when the defendant undertook to complete the water project, the state agreeing to build the new bridges made necessary by the raising of the level of the water which would result from the defendant's work. In April 1932 the state began the demolition of the old bridge and by March 1933 had completed a new one. On January 16, 1933, the defendant raised the level of the water and permanently submerged plaintiffs' land.

The State of Illinois would, in all likelihood, have sometime completed the project and submerged plaintiffs' land, if the defendant had not undertaken in 1930 to complete the waterway. The state had not, however, completed the project to the point of submerging plaintiffs' land and we do not regard the steps which it had taken, and its plans and hopes for the future, as having converted plaintiffs' land into a lawsuit against the state before the defendant took over the project. Whether the state's activities had gone so far that plaintiff could have sued it at all may be doubted, but we need not decide that. Before the defendant submerged the land, it had the same physical existence and substantially the same potentialities of use which it had earlier

had, though its prospects for the indefinite future were dubious.

It may be of some importance that what the defendant undertook to do was to complete the work begun by the state, so that it does not seem unfair to require the defendant to pay for what it took, even though the value of the property may have been prospectively impaired in some undetermined amount by the previous activities and plans of the state. The valuation of property taken for public purposes is not an exact mathematical process. It is important, however, that in a somewhat confused situation such as this, the owner shall not lose his property to the public use without being compensated at all.

We conclude that on January 16, 1933, the defendant took from plaintiffs their lot of a frontage of twenty-six feet, which was worth $100.00 per front foot, and their foundation, worth $2,200.00, and that plaintiffs are entitled to recover $4,800.00. Since plaintiffs' property was taken on January 16, 1933, it is necessary, in order to give them just compensation for the taking, that they be awarded interest from that date on $4,800.00. We find that interest at the rate of 4% is just compensation.

It is so ordered.

JONES, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

SAMUEL H. WHITE v. THE UNITED STATES

[No. 44620. Decided January 5, 1942]

On the Proofs

Pay and allowances; U. S. Navy officer with dependent mother; independent income from undivided estate.—Where under the will of plaintiff's father, who died in 1918, all of his estate, including real estate and life insurance proceeds, was devised to decedent's wife and their two sons share and share alike; and where said estate was never divided and plaintiff and decedent's other son permitted their mother to use and enjoy the entire income from said estate, including the residence and farm; and where, in addition, plaintiff made an allotment monthly from his

pay for the support of his mother during the period covered by the claim and counterclaim in the instant suit; and where said allotment and other contributions to his mother by plaintiff constituted a major portion of her support; it is *held* that plaintiff's contributions to his mother, represented by his interest in the estate income and said allotment, constituted a maintenance of a place of abode for his mother within the meaning of the Act of April 16, 1918, and plaintiff is accordingly entitled to recover.

Same.—The circumstances disclosed by the record and the contributions made by plaintiff to his mother's support during the periods of the counterclaim show that plaintiff "responded to a needy family condition" within the meaning of the Act of May 26, 1926.

The Reporter's statement of the case:

Mr. Rees B. Gillespie for the plaintiff.

Mr. Mortimer B. Wolf, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Miss Stella Akin* was on the brief.

Plaintiff sues to recover rental and subsistence allowances authorized by law for an officer of his rank having a dependent mother. The period for which such allowances are claimed began February 1, 1933.

The defendant has interposed a counterclaim for $1,339.15 on the ground that plaintiff was erroneously paid allowances for commutation of quarters, heat, and light on account of having a dependent mother for the periods January 1 to September 17, 1919, and June 25, 1920, to June 30, 1922.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. The plaintiff, Lieutenant Commander Samuel H. White, brings this suit under the provisions of the Act of Congress of June 10, 1922 (42 Stat. 625), for rental and subsistence allowances because of his dependent mother for the period from February 1, 1933, to date.

2. Mrs. Katherine Howard White, plaintiff's mother, is a widow, eighty-one years of age, and resides in York, South

Carolina. She has two sons, W. G. White, a widower with a son twenty-one years of age, and the plaintiff. W. G. White has made no contribution to the support of his mother within the period covered by this suit, save for his interest in the income from a mortgage of $10,000, bearing six percent interest, owned jointly by his mother, himself, and the plaintiff herein.

3. Plaintiff has contributed $100 a month to his mother by an allotment through the period covered by the present suit, i. e., from June 30, 1931, to date. From 1922 to June 30, 1931, he allotted his mother $75 a month. In addition to the allotments before mentioned, plaintiff gave his mother money orders and checks which varied from $25 to $50 a month.

4. Plaintiff's father died October 12, 1918, and his will probated April 3, 1919, provided that the insurance aggregating $14,000, whether payable to a named beneficiary or his estate, should be divided equally between his widow and two sons. After payment of decedent's debts and funeral expenses, there remained approximately $12,000, $10,000 of which was invested in a mortgage at six percent on a building in Charlotte, North Carolina. W. G. White and plaintiff gave all the income arising from the mortgage to their mother. In items 2, 3, 5, and 6 of the will, plaintiff's father devised and bequeathed all of his property, real and personal, including all insurance, to his wife, Kittie H. White, and two sons, W. G. White, Jr., and the plaintiff, share and share alike. Plaintiff's mother was made sole executrix of the will. The estate was not sold or otherwise divided and distributed to the three beneficiaries but was at all times, and still is, held intact with each of the three beneficiaries named having a one-third undivided interest.

5. There was also an amount of $2,000 of the estate invested at two percent which returns $40 a year to Mrs. White.

6. Plaintiff's mother requires approximately $150 a month for living expenses. Her cousin, Miss Julia Howard, lives with her and is in charge of the house for which she receives $25 a month. Living expenses by the month are as follows:

Food, $45; electricity, $4; clothing, $15; coal, $15; telephone, $2; cook and servant, $20; water rent, $2; taxes about $20.

7. In 1938, repairs to the mother's house cost about $600, of which plaintiff paid the majority. Plaintiff bought and paid for most of the furniture in the home, as well as for papering and painting. An operation for appendicitis in 1935 or 1936 cost $400 and an attack of pneumonia in 1938 cost about $200, for which plaintiff paid. These amounts were in addition to the regular allotment contribution.

8. Plaintiff's mother has lived in a home in York owned, under the terms of the will, in equal shares by her and her two sons, the estimated worth of which is $5,500, also approximately 300 acres of land with tenant houses thereon. These farm lands produce no income. Mrs. White also owns four shares of stock in the Lockmore Cotton Mills which pay no dividend. Her personal property is estimated to be worth $1,500.

9. The United States has interposed a counterclaim of $1,339.15 asserting that during the periods January 1 to September 17, 1919, and from June 25, 1920, to June 30, 1922, overpayments were made to plaintiff on account of commutation of quarters, heat, and light because of an alleged dependent mother in the sum of $1,959.78, under the Act of April 16, 1918 (40 Stat. 530). From this sum of $1,959.78 the amount of $620.63 has been recovered by checkage in plaintiff's account with the United States.

10. During the period January 1 to September 17, 1919, and from June 25, 1920, to June 30, 1922, plaintiff contributed $100 to the support and maintenance of his mother. Throughout these periods the mother's living expenses were approximately as set forth in finding 6, supra.

11. During the periods covered by the counterclaim, a son, W. G. White and an infant son, lived with his mother. W. G. White contributed $20 a month to his mother and paid light and water bills and helped with the taxes.

12. From January 1 to September 17, 1919, plaintiff held the rank of Lieutenant, Junior Grade, while from June 25, 1920, to June 30, 1922, his rank was Lieutenant.

The allowances for commutation of quarters during the period of the counterclaim were from $40 to $60 a month.

13. During the period of the claim beginning February 1, 1933, plaintiff's mother was in fact dependent upon him for her chief support.

14. During the periods of the counterclaim from January 1 to September 17, 1919, and June 25, 1920, to June 30, 1922, plaintiff maintained a place of abode for his dependent mother and during those periods responded to a needy family condition in an amount in excess of the allowances obtained by him during such periods.

The court decided that plaintiff was entitled to recover rental and subsistence allowances from February 1, 1933, and that defendant was not entitled to recover on its counterclaim.

LITTLETON, *Judge*, delivered the opinion of the court:

On the question whether plaintiff's mother during the period of the claim beginning February 1, 1933, was in fact dependent upon him for her chief support, the defendant concedes that she was so dependent under the rule applied and followed by this court (*Tomlinson* v. *United States*, 66 C. Cls. 697), even under the theory of the defendant that the total gross income of $700 a year from property of her husband's estate was income of the mother in her own legal right. This total gross income was less than half of the reasonable and necessary living expenses of plaintiff's mother, as shown by the record, of $1,596 a year. However, the gross income of $700 a year from the property from which it was received was not exclusively the income of plaintiff's mother. Legally and in fact, as shown by the record, and as the defendant was expressly advised October 16, 1922, the plaintiff's mother had only a one-third interest in the property which produced this income, and therefore the separate gross income of plaintiff's mother in her own right was not more than $19.44 a month. The fact that plaintiff and his brother, W. G. White, who each had and still have a one-third interest in the property, permitted their mother to have and use their portions of the income

for her maintenance and support does not affect the question whether the contributions which plaintiff otherwise made to his mother in cash during the period of the claim constituted her chief support. The manner in which the property of the estate of plaintiff's father was handled by the mother and the two sons represented as to plaintiff an additional contribution by him to his mother insofar as his interest in the property and income therefrom were concerned.

Plaintiff's father died October 12, 1918, and in a will which was probated April 30, 1919, he left all of his property, real and personal, to his wife and two sons, share and share alike. None of the property was sold, the parties in interest agreeing, instead, to keep it intact and to invest the insurance proceeds. Plaintiff's mother was executrix of the estate. The amount of $10,000 of the net insurance proceeds of $12,000 was invested in a mortgage, producing an income at 6 percent, but plaintiff had a one-third interest in this investment and the income therefrom, to the extent of his interest, he gave to his mother to use for her support.

In view of the facts set forth in the findings and what we have said above with reference to the extent of the interest of plaintiff's mother in the property of her husband's estate, we think it is clear that the defendant's counterclaim for alleged overpayments allowed and made to plaintiff under the Act of April 16, 1918, 40 Stat. 530, is without merit, especially in view of the provisions of the Act of May 26, 1926, 44 Stat. 654. The theory of the counterclaim is that the entire property of the estate of plaintiff's father was in law and in fact the property of plaintiff's mother. On that theory it is contended that plaintiff did not at any time during the periods of the counterclaim maintain "a place of abode for a * * * dependent parent" within the meaning of the Act of April 16, 1918, *supra*, and that he was therefore not entitled to any allowance as commutation for quarters for himself and dependent, if not furnished by the Government, and commutation for heat and light. During the periods of the counterclaim, as set forth in finding 10, plaintiff regularly contributed $100 a month to his

mother for her support and maintenance and in addition his one-third interest in the home in which she lived. W. G. White lived in the home with the mother and made some contributions to the mother as set forth in finding 11. Plaintiff's contribution to his mother, represented by his interest in the home property and the $100 a month, constituted a maintenance of a place of abode for his mother within the meaning of the Act of 1918. In any event, any doubt as to this was removed by the Act of May 26, 1926, *supra*, which directed the Comptroller General to allow credits in the accounts of disbursing officers for payments of commutation of quarters, heat, and light under the Act of April 16, 1918, *supra*, because of a dependent parent, and as rental and subsistence allowance under the Act of June 10, 1922, 42 Stat. 625, because of a dependent mother, made in good faith by disbursing officers prior to July 1, 1923 "where the payee responded to a needy family condition in an amount at least equal to the allowances obtained by him." The circumstances disclosed by the record and the contributions made by plaintiff during the periods of the counterclaim show that he responded to a needy family condition within the meaning of the act last referred to in a total amount far in excess of the allowances paid to him. *Halloran* v. *United States*, 69 C. Cls. 59.

The defendant's counterclaim is dismissed, and judgment will be entered in favor of plaintiff for the amount due from February 1, 1933 (*Tricou* v. *United States*, 71 C. Cls. 356; *Page* v. *United States*, 73 C. Cls. 626), to date of judgment upon the filing of a report by the General Accounting Office showing the amount due in accordance with the foregoing findings of fact and opinion. It is so ordered.

Madden, *Judge;* Jones, *Judge;* Whitaker, *Judge;* and Whaley, *Chief Justice*, concur.

On March 2, 1942, upon a report from the General Accounting Office, showing the amount due under the court's decision of January 5, 1942, judgment was entered for the plaintiff in the sum of $10,031.71.

M. L. SHEPARD v. THE UNITED STATES

[No. 44724. Decided January 5, 1942]

On the Proofs

Government contract; error in bid accepted as lowest submitted.—Where plaintiff, in response to invitation of defendant, submitted a bid for furnishing coal; and where on sheet No. One of schedules attached to said invitation to bidders plaintiff entered a bid price of $3.75 per ton, and on sheet No. 10 of said schedules a bid price of $2.75 per ton was entered by error of plaintiff's attorney; and where both sheets were signed by plaintiff before submission; and where on said bid the contract for said coal was awarded to plaintiff as the lowest bidder; and where after delivery plaintiff was paid at the rate of $2.75 per ton; it is *held* that plaintiff is entitled to recover at the rate of $3.50 per ton, which was the price named in the lowest bid submitted.

The Reporter's statement of the case:

Mr. M. L. Shepard pro se.

Mr. Joseph Tubridy, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. On January 19, 1939, the United States through the District Quartermaster at Littleton, Colorado, issued invitations to bid for furnishing coal to District Headquarters, Littleton, Colorado, and C. C. C. camps in the Colorado-Wyoming District.

2. The invitation to bid was set forth on U. S. Standard Form 33 (revised) numbered C. C. C. 5819–39–38.

This invitation was designated as the "Short Form Contract," and referred to attached schedules for more specific details of the subject of the invitation to bidders. The attached schedules consisted of sheets numbered Two, Three, Four, Five, and Ten of Circular Proposal No. C. C. C. 5819–39–38, dated January 19, 1939.

3. Plaintiff entered on the face of the U. S. Standard Form 33 (revised) opposite the printed words "Bids for: Coal 'for C. C. C. Camp D G 107–C' " and under the columns

"Quantity, Unit, Unit Price, Dollars, Cents," these entries: "300 tons $3.75—$1125.00."

4. Item No. 10 of the schedule, on Sheet No. Ten, under the heading "Schedule of Requirements," set forth the number of tons contemplated by the proposal and an "Analysis of Coal Required."

Under the heading "Bidder's Analysis," the contractor was required to fill in an analysis of the coal in percentages under the following items: "Moisture, Volatile, Carbon, Ash, Sulphur, B. T. U."

There was also required to be inserted by the bidder the name of the mine, location of the mine, name and operator of the mine.

At the bottom of Sheet No. Ten, there appeared under the legend "Bid II, Truck Delivery Mine to Destination" the following items:

D. Cost per net ton F. O. B. mine (less excise tax).
E. Cost per net ton for trucking (mine to destination).
F. Cost per net ton at destination (D & E).

The bidder was required to fill in the prices opposite items D, E, and F.

5. The entries under Item No. 10 were prepared for plaintiff by his attorney and were filled out as follows:

D. Cost per net ton F. O. B. mine (less excise tax)	$2.00
E. Cost per net ton for trucking (mine to destination)	.75
F. Cost per net ton at destination (D & E)	2.75

Plaintiff signed both Sheet No. One, carrying the price of $3.75 per ton, and Sheet No. Ten, setting forth the price of $2.75 per ton, without noticing the variance in price.

6. The "Invitation, Bid, and Acceptance," C. C. C. 5819-39-38, together with the five sheets of circular proposal No. C. C. C. 5819-39-38, were duly forwarded to District Quartermaster, Littleton, Colorado. The price of $3.75 as a unit price per ton on the face of the Invitation, Bid and Acceptance form was unnoticed by the District Quartermaster when he signed the formal acceptance of the bid on the same sheet. Plaintiff's bid was accepted in the belief that it was the lowest bid at the price of $2.75 per ton. The practice in the District Quartermaster's office with regard to

prices bid was to consider only the prices set out in the Schedule of Requirements.

7. On March 4, 1939, plaintiff received an acceptance of his bid by the following telegram:

> To Mr. M. L. Shephard,
> *Meeker, Colorado.*
>
> You are being awarded this date 300 tons coal for DG-107-C on proposal 38. All deliveries to start immediately and to be made to campsite. Award being mailed.
>
> Sparks.

Plaintiff began deliveries at once.

8. On March 23, the District Quartermaster at Littleton, Colorado, forwarded to plaintiff a letter enclosing a delivery order which set forth the price of $2.75 per ton as the unit price. Plaintiff did not know until the receipt of this letter that the award was made on the basis of a price of $2.75 per ton. 150 tons of coal had been delivered by this time.

9. Plaintiff on March 24, through his attorney, wrote the District Quartermaster at Littleton, Colorado, calling attention to the variance in the bid prices:

> As per our telephone conversation on the above date, your attention is called to the variation in the bid as contained in Sheet No. One of $1,125.00 and the amount of $825.00 as contained in the acceptance also shown on same sheet. Your delivery order also sets up the amount as $825.00. In our conversation you called attention to the price set forth at $2.75 on page No. 10 of the "Schedule of Requirements," which was a typographical error.

10. On March 27, 1939, the District Quartermaster replied as follows:

> In reply to your letter of March 24, 1939, relative to an error in the bid of Mr. M. L. Shepard, this is to advise that Mr. Shepard's bid, as shown on the reverse of Sheet No. 10, is the governing factor in the contract as it was not noticed that he had shown on Sheet No. 1 the price which he now claims is the correct price.

11. There are no directions on the U. S. Standard Form 33 as to whether the bidder or the acceptance officer shall fill in the quantities, unit prices, and the total amount of the bid under the heading "Quantity, Unit, Unit Price, Dollars."

12. The next lowest bid to that of plaintiff's was $3.50 per ton for delivery at the campsite. Under the practice of awarding contracts to the lowest bidder plaintiff would not have been awarded the contract at the bid price of $3.75 per ton.

13. The price of $2.75 per ton in Item No. 10, Sheet No. Ten of the Schedule attached to the Invitation for Bids, was entered through inadvertence on the part of plaintiff.

14. Plaintiff delivered 300.45 tons of coal under the contract at the rate of $2.75 per ton and has been paid $826.23.

15. The reasonable value of the coal delivered by plaintiff has not been proved.

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

Plaintiff, pursuant to an invitation issued by the War Department, submitted a bid for furnishing coal for the Civilian Conservation Corps in Colorado and Wyoming. The invitation consisted of a printed "Short Form Contract," and several attached sheets. On the printed sheet plaintiff offered to furnish 300 tons at $3.75 per ton, making a total price of $1,125. On sheet ten of the attached papers, plaintiff filled in the prices as shown below:

Bid II, Truck Delivery Mine to Destination

D. Cost per net ton F. O. B. mine (less excise tax)	$2.00
E. Cost per net ton for trucking (mine to destination)	.75
F. Cost per net ton at destination (D & E)	2.75

The last two of these figures were inserted by error by plaintiff's lawyer, who prepared the papers for plaintiff. Plaintiff signed both the printed sheet and sheet ten, not noticing the erroneous figures on sheet ten.

The District Quartermaster looked at the price shown on sheet ten as was his practice, and did not notice the price shown on the printed sheet. On March 11, 1939, he sent a telegram awarding the contract to plaintiff, but making no mention of price, which he thought to be $2.75 per ton and plaintiff thought to be $3.75 per ton. On March 23, 1939, the quartermaster sent plaintiff a written delivery order show-

ing that the price was $2.75 per ton. By this time 150 tons of the coal had been delivered.

After the misunderstanding had been thus revealed, plaintiff claimed that he was entitled to the $3.75 rate, but completed his deliveries of the rest of the coal contracted for. The defendant paid plaintiff at the rate of $2.75 per ton. Plaintiff sues for $300.45, which would give him $3.75 per ton, the price he wrote on the printed sheet.

The misunderstanding here was due to carelessness on both sides, as a result of which the minds of the parties did not meet on the vital subject of price. But the defendant received the coal, and is, under the circumstances here shown, bound to pay for the benefit it has thus received. A ready measure of that benefit is available, since the lowest unambiguous bid for the same contract was to furnish the coal at $3.50 per ton.

Plaintiff is entitled to recover $225.34. It is so ordered.

JONES, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

STANLEY M. BARNES v. THE UNITED STATES

[No. 44744. Decided January 5, 1942]

On the Proofs

Pay and allowances; unmarried Navy officer with dependent mother.—Where it is shown by the evidence adduced that plaintiff, an unmarried officer of the United States Navy, was in fact the chief support of his mother; it is *held* that plaintiff is entitled to recover rental and subsistence allowances for the years 1937 and 1938, and to date of judgment.

The Reporter's statement of the case:

Mr. M. C. Masterson for the plaintiff. *Ansell, Ansell & Marshall* was on the brief.

Miss Stella Akin, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiff graduated from the United States Naval Academy and has been a commissioned officer of the United States Navy since May 29, 1934. He held the rank of ensign until July 2, 1937, when he was promoted to lieutenant, junior grade. From May 29, 1937, to January 8, 1938, plaintiff was on shore duty, and he was on sea duty during the remainder of the period of this claim, to wit, January 1, 1937, to date.

2. Plaintiff's father died May 16, 1929. At the time of his death the father owned no real estate, but he owned personal property consisting of stocks and bonds valued at approximately $4,690. He also left two insurance policies, one for $700 and another for $1,280. All of the property was left by will to plaintiff's mother.

3. Plaintiff's mother, Harriet Mary Osborne Barnes, was born on March 5, 1879. She did not remarry after the death of plaintiff's father. She has one child besides the plaintiff, a daughter, Irene Osborne Barnes.

4. During the period of this claim the mother's health was not good, which prevented her from engaging in gainful employment. Occasionally, for limited periods, she did secretarial work for an eleemosynary institution, from which she received a little pay.

5. On January 1, 1937, the date of the commencement of this claim, plaintiff's mother owned no real estate. She owned some personal property consisting of stocks and bonds valued at approximately $4,700. Since that time the stocks and bonds have decreased in value and the income therefrom has also decreased.

6. The income received by the mother from her stocks and bonds since January 1, 1937, amounted to $450.26 in 1937, $303.72 in 1938, $376.66 in 1939, and $121.92 from January 1 to June 1, 1940; and during each of the years 1938, 1939, and 1940 she received $50 for secretarial work, and in 1940 she received $5 from her daughter. She had no other income during the period of this claim, except the contributions from her son, the plaintiff, as shown in finding 10.

7. Of the personal property left her by her husband she disposed of some of the stocks, amounting to $2,431.47, the proceeds of which were used by her for living expenses prior to January 1, 1937. The proceeds of the two insurance policies referred to in finding 2 were used in the payment of her husband's funeral expenses, expenses incident to the serious illness of her daughter immediately after the death of the father, and living expenses prior to January 1, 1937.

8. During the entire period of the claim the plaintiff's mother lived in an apartment at Concord, New Hampshire, the rent of which was $37 a month prior to August 1, 1939, and subsequent to said date it has been $35 a month. The daughter lived with her mother until August 1939, during which time the daughter paid her mother $40 a month for room and board. It cost the mother $38.00 per month to furnish this room and board, leaving a net profit of $2.00 a month. From October 4, 1939 to November 18, 1939, the mother furnished room and board to a teacher, for which she received $7.00 a week.

9. The mother's household and living expenses for the year 1937 were $1,551.70; for 1938, $1,440.42; for 1939, $1,387.79; and from January 1 to June 17, 1940, $479.01. In addition to the expenses incurred for 1937, the mother gave $183.25 toward the expenses of her daughter's summer school. Yearly the mother paid a poll tax of $2 and a State tax on investments of $5.06. The plaintiff's mother has at no time occupied Government quarters.

10. The plaintiff made regular contributions for the support of his mother during the period of this claim by monthly allotments from the Navy Department as follows: $760 in 1937; $740 in 1938; $700 in 1939; and $300 from January 1 to June 1, 1940. In addition to the regular monthly contributions, plaintiff gave his mother $125 in 1937 and $20 in 1938.

11. Plaintiff never married. Plaintiff submitted a claim to the General Accounting Office for rental and subsistence allowances on account of a dependent mother for the years 1937 and 1938, but the claim was disallowed. Plaintiff has

never been paid increased rental and subsistence allowances on account of a dependent, and claims such allowances for the period from January 1, 1937, to the date of judgment.

12. Plaintiff's mother was dependent upon him for her chief support from January 1, 1937 to June 1, 1940.

The court decided that the plaintiff was entitled to recover, entry of judgment being deferred until the coming in of a report from the General Accounting Office showing the amount due in accordance with the opinion *per curiam*, as follows:

From the findings of fact it appears that for the year 1937 the plaintiff contributed to his mother's support $885.00, and that her income from all other sources in that year was $524.26; for the year 1938 he contributed $760.00, and her income from all other sources was $377.72; for the year 1939 plaintiff contributed to her support $700.00, and her income from all other sources was $440.66; and from January 1, 1940 up until the first of June 1940 the plaintiff had contributed $300.00 to her support, and her income from all other sources for this period was $176.92.

It is, therefore, apparent that plaintiff was in fact his mother's chief support.

Included in her income from all other sources is a profit of $2.00 a month which the mother made from furnishing room and board to her daughter. The daughter paid $40.00 a month room and board, and the mother testified it cost her $38.00 a month to furnish this room and board, leaving a net profit of $2.00 a month.

Entry of judgment will be deferred until the incoming of a report from the General Accounting Office showing the amount due computed in accordance with this opinion. It is so ordered.

WILMON TUCKER, ADMINISTRATOR WITH THE WILL ANNEXED OF THE ESTATE OF SARAH E. SMITH v. THE UNITED STATES

[No. 44870. Decided January 5, 1942]

On Defendant's Demurrer

Income tax; claim of estate timely filed under section 262, Title 28, U. S. Code.—Where, as a result of hearings held from August 25 to October 6, 1930, it was known to the duly authorized representatives of the Government, including the Collector of Internal Revenue, that certain funds in cash in a safe deposit box and on deposit in a bank were held by one Reese B. Brown in trust for the use and benefit of plaintiff's decedent, Sarah E. Smith; and where during said hearings it was not disclosed to said Sarah E. Smith that the collector upon a warrant of distraint against said Brown had previously seized and impounded the then unknown contents of said safe deposit box and the said funds on deposit on August 7, 1930; and where, thereafter, in November 1930 the collector withdrew and took possession of the said funds in said safe deposit box and on deposit, and deposited the total of these amounts to his credit as collector; and where after a determination of deficiency against said Brown and Sarah E. Smith, and a jeopardy assessment against Brown but not against Sarah E. Smith, and upon an appeal to the Board of Tax Appeals, while the said funds were being held as stated by said collector, stipulations were filed and a decision made by said Board on October 12, 1933, and thereupon, on or shortly after October 12, 1933, said collector collected and satisfied the deficiency determined against Brown as well as the deficiency against Sarah E. Smith from the trust funds so held as stated, which said funds were for the use and benefit of said Sarah E. Smith, whose death had occurred on July 24, 1932; it is *held* that the claim of the estate of said Sarah E. Smith against the defendant had not accrued in a shape to be effectually enforced until said trust funds had been applied, as stated, and covered into the Treasury of the United States on October 12, 1933, and the petition in the instant case, filed in the Court of Claims on September 16, 1939, was accordingly timely filed within the meaning of section 262, U. S. Code, Title 28.

Mr. George C. Dix for the plaintiff. *Mr. Karl J. Hardy* was on the brief.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Mr. Robert N. Anderson* and *Mr. Fred K. Dyar* were on the brief.

The facts sufficiently appear from the opinion of the court.

LITTLETON, *Judge*, delivered the opinion of the court:

The original petition in this case was filed September 16, 1939, to recover $28,064.75 on an implied contract. *Kirkendall* v. *United States*, 90 C. Cls. 606. The defendant demurs to the petition on the ground that no cause of action against the United States within the jurisdiction of this court is stated for the alleged reason that the claim asserted in the petition accrued August 7, 1930, more than six years prior to the filing of the petition.

Plaintiff replies that the claim made in the petition did not accrue within the meaning of section 262, U. S. C. A., Tit. 28, until October 12, 1933, less than six years prior to the filing of the petition. The facts alleged in the petition show the following:

1. Sarah E. Smith, an unmarried woman and a citizen and resident of King County, State of Washington, died July 24, 1932, at Montreal, Canada, while temporarily residing there, and that on July 9, 1934, plaintiff was duly appointed and qualified as administrator with the will annexed of the estate of Sarah E. Smith.

2. During 1929 and 1930 Miss Smith entrusted to one Reese B. Brown, of the State of Washington, sums of money belonging to her to be held by Brown for safekeeping and for her use and benefit. At the time of her death in 1932 she was seventy years of age. Brown received the money under the arrangement for the use and benefit of Sarah E. Smith and for safekeeping by him, and on and after August 7, 1930, had $53,440 thereof in United States currency in a safe-deposit box, #2026, in the First National Safety Deposit Company at Kansas City, Missouri, and the balance, $6,470.39, on deposit in a checking account in his name

in the Crocker First National Bank of San Francisco, California.

3. Prior to the death of Sarah E. Smith no accounting or settlement was requested of or made by Brown to her, and at all times Brown held the money in trust for safekeeping and for the use and benefit of Sarah E. Smith. No part of the money delivered and entrusted to Brown by Sarah E. Smith during 1929 and 1930, and so held by him between that date, or dates received by him, and October 12, 1933, was the private property of Brown.

4. On or shortly prior to August 7, 1930, the Commissioner of Internal Revenue made a jeopardy assessment of alleged additional individual income tax, interest, and penalties against Reese B. Brown in the total amount of $497,897.86. Upon receipt of such jeopardy assessment, the collector of internal revenue on August 7, 1930, prepared a warrant of distraint thereon against Brown by authority of which the collector seized and impounded certain properties of Brown and also levied the warrant of distraint upon the then unknown contents of safe-deposit box #2026, in which the amount of $53,440 belonging to Sarah E. Smith was being held in the First National Safety Deposit Company at Kansas City, Missouri, and upon the sum of $6,470.39 being held by Brown in trust for Sarah E. Smith and on deposit in an account in his name in the Crocker First National Bank, San Francisco.

5. The funds so held by Brown in trust for the use and benefit of Sarah E. Smith, upon which the distraint warrant was levied as aforesaid, were not taken and applied by the collector as a collection prior to October 12, 1933, in satisfaction of the tax liability assessed against Brown.

6. September 25, 1930, the Commissioner of Internal Revenue prepared and mailed to Brown by registered mail a statutory notice of his final determination of a deficiency in his individual income tax, which, together with interest and penalties claimed, amounted to $497,897.86. In this deficiency notice Brown was advised of his right under the statute to file a petition within sixty days with the United States Board of Tax Appeals for a redetermination of the deficiency as determined by the Commissioner. Accordingly,

Brown prepared and filed with the Board a petition for a redetermination of the deficiency.

7. Thereafter, and while Brown's petition was pending before the Board, the collector of internal revenue in November 1930 withdrew and took possession of the $53,440 in safe-deposit box #2026 in the First National Safety Deposit Company at Kansas City, Mo., and also took possession of the amount of $6,470.39 on deposit in the Crocker First National Bank, San Francisco, and deposited the total of these amounts to his credit in a special account as collector of internal revenue to await the final redetermination by the Board of Tax Appeals and the courts of the tax deficiency claimed by the Commissioner against Brown.

8. In August 1930 the Commissioner determined a deficiency in respect of the individual income tax of Sarah E. Smith for the years 1926 to 1929, inclusive, in the sum of $67,-973.46, and mailed her a statutory deficiency notice thereof, under which she had the right to file a petition with the Board of Tax Appeals for a redetermination. No jeopardy assessment appears to have been made against Sarah E. Smith. Within the time allowed, Sarah E. Smith duly filed a petition with the Board of Tax Appeals for a redetermination.

9. On August 25, September 9, 10, and 12, and on October 6, 1930, special agents of the Treasury Department, representing the Commissioner of Internal Revenue and the collector of internal revenue, held hearings and examinations at Seattle, Washington, in connection with and relating to the income tax liabilities of Reese B. Brown and Sarah E. Smith as theretofore determined and asserted by the Commissioner. At these hearings Reese B. Brown and Sarah E. Smith appeared as witnesses and, upon examination by the Treasury agents, they both testified under oath with reference to the properties owned by them, and that the money on deposit in the account of Reese B. Brown in the Crocker First National Bank of San Francisco and the money in safe-deposit box #2026 of the First National Safety Deposit Company of Kansas City, amounting in all to $59,910.39, belonged to Sarah E. Smith; that these funds were being held by Brown in trust for her, and they further testified that a trust relationship existed between Brown and Sarah E. Smith, that

he was acting as her trustee in respect of such funds. The information thus furnished regarding the trust character of the particular funds mentioned was fully known to the duly authorized representatives of the government, including the collector of internal revenue, at all times thereafter and on October 12, 1933.

10. During the examinations and hearings by the special agents of the Treasury Department, as above-mentioned, they did not disclose to Sarah E. Smith that the collector had distrained upon the funds mentioned, and held by Brown for her use and benefit, and it was not disclosed by the special agents at the hearings mentioned that the collector had withdrawn and taken possession of such funds and had deposited them in a special account to his credit as collector of revenue. Sarah E. Smith was not advised at any time during her lifetime and she did not know that the funds so held by Brown for her use and benefit under the arrangement hereinbefore mentioned had been levied upon, withdrawn and held by the collector as aforesaid.

11. Thereafter, on October 12, 1933, while the aforementioned fund of $59,910.39 was being held by the collector in a special fund awaiting final determination, a hearing was had before the Board of Tax Appeals at Portland, Oregon, on the petition of Reese B. Brown with respect to his tax liability as determined by the Commissioner, and a stipulation between the Commissioner and Brown was prepared and filed in which it was stipulated that the deficiency in respect of the tax liability of Brown was $28,064.75.

12. On the same day, to wit, October 12, 1933, the Board of Tax Appeals heard the petition of Sarah E. Smith at Portland, Oregon, for the redetermination of the deficiencies determined by the Commissioner in respect of her individual tax liability for the years 1926 to 1929, inclusive, in the amount of $67,973.46, and it was stipulated between the Commissioner and Sarah E. Smith through Reese B. Brown as her attorney-in-fact that the deficiency in respect of her individual tax liability for the years mentioned was in the total amount of $31,845.64. Decisions of the Board of Tax Appeals were entered upon and in accordance with the stipulations.

13. As a result of the stipulations and the decisions of the Board, the collector of internal revenue on or shortly after October 12, 1933, collected and satisfied the deficiency so determined in respect of the individual income tax liability of Brown by applying $28,064.75 of the funds so held by the collector, as hereinbefore stated, in full satisfaction and in discharge of said tax liability of Brown, and thereupon covered the amount of $28,064.75 into the Treasury of the United States.

14. In the same way and at the same time, to wit, on or shortly after October 12, 1933, the collector collected the deficiency of $31,845.64 in respect of the individual tax liability of Sarah E. Smith, deceased, by applying in satisfaction and discharge thereof that amount from the balance of the funds so held by him, as hereinbefore mentioned, and covered the same into the Treasury of the United States.

Upon the foregoing facts the demurrer must be overruled. The facts alleged show that the collector of internal revenue without the knowledge or consent of the decedent took money which belonged to her and used it to pay and satisfy the individual tax liability of another person, for which tax she was in no way liable, and he did so as the authorized representative of the United States and with the knowledge that the money so used was not the property of the person to whose liability it was applied to satisfy. Until the funds belonging to plaintiff were so applied by the collector and covered into the Treasury, no claim of Sarah E. Smith or her estate for a money judgment against the United States accrued. If the decedent had known of the action of the collector in levying upon funds belonging to her under a distraint warrant upon an assessment against Brown, her only remedy prior to the date on which the collector actually applied a portion of the money as a collection of a tax due by Brown and covered it into the Treasury of the United States would have been a personal action against the collector proceeding for an injunction. But such a remedy, if it existed, did not represent or include a cause of action for a money judgment against the United States under section 262, Tit. 28, U. S. C. A. Such a claim did not accrue until the money was subsequently applied and covered into the Treasury of the United States. Until

then the claim of the estate of Sarah E. Smith asserted in this action had not accrued in a shape to be effectually enforced. *Borer* v. *Chapman*, 119 U. S. 587, 602; *United States* v. *Wurts*, 303 U. S. 414, 418.

The demurrer is overruled and it is so ordered.

MADDEN, *Judge;* JONES, *Judge;* WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

HARRY MERRITT AND LUCIEN MERRITT, CO-PARTNERS, OPERATING AND DOING BUSINESS AS MERRITT DREDGING COMPANY, v. THE UNITED STATES

[No. 45089. Decided January 5, 1942]

On the Proofs

Government contract; rental of dredge "per hour."—Where in a contract with plaintiff, drawn by the defendant, for the rental of one hydraulic dredge and equipment, it was provided that rental at a price stipulated "per hour" would be paid; and where in said contract it was likewise provided that such rental "per hour" would be paid while the dredge was not pumping due to breakdowns within stated limitations; it is *held* that plaintiff is entitled to recover on the basis of rental "per hour" and not "per pumping hour."

Same.—A contract drawn by the defendant is to be strictly construed against it.

The Reporter's statement of the case:

Mr. George R. Shields for plaintiff. *Mr. James T. Clark* and *King & King* were on the briefs.

Mr. Gaines V. Palmes, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. During all the pertinent times herein mentioned plaintiffs were and now are citizens of the United States. They were partners engaged in the dredging business in the State of South Carolina, then and now operating under the name of Merritt Dredging Company, with offices in the City of Charleston, South Carolina.

2. On March 17, 1937, in response to defendant's invitation for bids by the United States Treasury Department, State Procurement Office, Columbia, South Carolina, plaintiffs submitted their bid for "rental of one hydraulic dredge, including floating pipe line, shore pipe line, necessary attendant plant and labor and material necessary for the efficient operation of the plant, in accordance with the specifications attached hereto, 250 hours. Above equipment to be rented at the rate of $39.90 per hour."

Plaintiffs' bid was accepted by letter dated March 24, 1937 from the State Procurement Officer to plaintiffs.

The following are pertinent parts of the contract:

> 1. Rental of One Hydraulic Dredge, including floating pipe line, shore pipe line, necessary attendant plant and labor and material necessary for the efficient operation of the plant, in accordance with the specifications attached hereto, 250 Hours.
>
> Above equipment to be rented at the rate of $39.90 per hour.
>
> * * * * *
>
> No work will be required on Sundays or legal holidays, therefore no payments will be made for time lost on these days. The price bid is to include all labor, material, attendant plant and accessories necessary for the efficient operation of the dredge excepting common labor for shore crew. All operating expenses must be paid by the contractor, who shall also assume all responsibility for injuries of any nature or from any source to men employed by him in connection with the work. He must also assume responsibility for any accidents to his plant. *The number of hours of rental stated may be increased or decreased 25 percent.* [Italics supplied.]
>
> 2. *Capacity.*—The dredge must have a suction and discharge line not less than 15 inches in diameter. The contractor must guarantee a capacity of not less than 400 cubic yards per pumping hour. If the actual production, as determined by measurement, is less than this amount, the rental rate will be reduced in the proportion that the actual production is less than the guaranteed minimum. The contractor must also guarantee an average daily pumping time of not less than 12 hours per day while the dredge is actually engaged on the work, towing time, Sundays and legal holidays not in-

cluded. The dredge must be equipped with ladder and spuds of sufficient length to permit dredging in 18 feet of water, and must have at least 500 feet of floating discharge line, 2,000 feet of shore line and all necessary plant for towing and handling pipe line, fuel, and supplies for efficient operation.

3. *Character of material.*—The material to be removed consists of marsh mud, probably some clay, oyster shell, logs, and debris. A portion of the area to be dredged is covered by marsh grass.

The dredged material is to be deposited as a ponded fill within dikes constructed and maintained by forces employed by the Works Progress Administration. The bidder to furnish all labor, material, supplies, and equipment necessary to complete the estimated quantity of dredging within the time limits specified above. The Works Progress Administration to furnish the common labor for handling pipe line from shore connection. Contractor to furnish the necessary supervisory personnel to direct the Works Progress Administration labor handling the pipe line on the shore.

(1) The work to be done consists of the removal and disposal of all material lying above the plane of 8 feet below mean low water within the specified area shown on attached map.

(2) The total estimated quantity of material necessary to be removed from within the specified limits is 100,000 cubic yards place measurement.

* * * * *

Breakdown.—The Works Progress Administration will allow one hour accumulative time per 24-hour day for breakdowns. Time lost for breakdowns in excess of this amount will not be paid for.

Payment.—Payment will be made as soon as possible after the completion of the work.

* * * * *

The dredge will be subject to inspection and acceptance by the Works Progress Administration.

3. Upon receipt of notice to proceed, plaintiffs placed their hydraulic Dredge *Cherokee* on the work and began dredging at 8 o'clock a. m., on May 17, 1937, and completed the dredging of 99,866 cubic yards by 7 o'clock p. m., on June 2, 1937, the total time on the job being 347 hours.

4. The Dredge *Cherokee* was an efficient 17-inch suction, 15-inch discharge, hydraulic dredge, of a 650 H. P. capacity

and on the materials encountered in the area outside of the old roadway bed was capable of maintaining a capacity of 400 cubic yards per hour and more on the instant project; but it was not readily adaptable to the removal of the heavy and large-sized material encountered in the old roadway area, as described in Finding 6.

5. Plaintiffs made an examination of the site of the project prior to making their bid and had observed the excavation of the "original basin" previously, and were familiar with the materials in the area to be excavated under the proposed contract, except the area covered by a road that extended across this new project. They observed this roadway but made no tests and concluded from its appearance that it was composed of mud and clay. Plaintiffs relied upon the specifications in the contract as to the materials to be dredged.

6. Plaintiffs commenced the work of dredging and found the materials encountered to be mud and clay with some logs, and considerable grass and weeds. On the second day, in the particular area covered by the road, and about two feet below the surface, they came upon an old roadbed, which had evidently been built many years previously and had settled, upon which the surface roadway had been filled. They encountered in this old subsurface road area a sheet pile dike parallel on each side of the old road, heavy piling, stringers, brickbats, and large rocks 8″ to 10″ in diameter, the old road having a brick walled culvert or sluice. The material in this old subsurface road was materially different from the remainder of the contract area, and choked up the pump continuously, causing the work to proceed more slowly and caused serious and material delay in plaintiffs' operations.

7. During the progress of the work, when plaintiffs experienced difficulties in dredging, plaintiffs advised the defendant's representatives, some of whom visited the site of the project, and the Government supervisors regularly on the project of the existing situation. This was early in the performance of the work.

8. Upon plaintiffs' completion of the work on the project, the defendant, through J. E. Macdonald, Assistant District

Director at Charleston, prepared from defendant's records and furnished to plaintiffs a statement on a yardage basis, showing total yards excavated 99,866, total pumping time 334.25 hours, rate per hour 298.7763 cubic yards, and total dredging time 334 hours 15 minutes.

Plaintiffs' total time on the project was 347 hours. There were delays of 72 hours 20 minutes, of which 45 hours 8 minutes were due to the defendant changing lines, etc. During the time the defendant was changing shore lines plaintiff's men and equipment were standing by ready to resume operations as soon as the lines were changed. Plaintiffs had delays of 27 hours 12 minutes, from which is to be deducted as "allowable time" under the contract 14 hours 27 minutes, which leaves chargeable to plaintiffs 12 hours 45 minutes of delay. Deducting 12 hours 45 minutes from the total time on the project, 347 hours, leaves 334 hours 15 minutes, the total rental time claimed by plaintiffs.

No accurate measurement or survey was kept of the actual production time per hour. However, plaintiffs and defendant estimated that approximately 225 hours of the total time of 334 hours 15 minutes were required to excavate in the area other than the old roadway, and that excavation was at the rate of 400 or more cubic yards per hour, and that approximately 109 hours 15 minutes were used in excavating within the area of the old roadway, at the rate of 90.3066 cubic yards per hour.

9. From the record furnished by defendant, and from their own records, plaintiffs prepared their invoice or bill against the Government (erroneously dated May 28, 1937) on or about June 28, 1937, reducing the bill to an hourly rather than a yardage basis, as follows:

225 Hours at $39.90 per hour	$8,977.50
400 cu. yds. per hr. for 225 hrs., 90,000 cu. yds.	
109.25 Hours at $9.008 per hour [1]	984.12
90.3066 [1] cu. yds. per hr. for 109.25 hrs., 9,866 cu. yds.	
	9,961.62

Total dredged, 99,866 cubic yards.

[1] Reduced capacity of dredge due to digging and removal of old structures in place, rip-rap, square piling and sheet pile dike encountered in the area dredged, all of which were not described in the contract specifications.

10. On the same date, June 28, 1937 (the correct date), plaintiffs rendered to defendant an additional bill based upon the difference in the amount allowed by defendant in its statement and the amount of rental computed at the contract rate of $39.90 per hour, for the full period of 334.25 hours, as follows:

W. P. A. Project #2247 Req. 2-1-691
Charleston, S. C.
Contract No. ER-Tps-33-947 dated March 17, 1937.
Dredging completed by dredge *Cherokee* and attendant plant at the municipal Yacht Basin, Charleston, S. C. Rental period May 17, 1937, thru June 2, 1937.
Additional rental necessary on account of reduced capacity due to dredging and removal of old structures in place. Riprap, square piling, and sheet pile dikes encountered in the area dredged, all of which were not described in the contract specifications.
109.25 Hours at $30.892 per hour________________________ $3,374.95

NOTE.—The above price per hour is based on the difference between the accepted contract rental bid price, namely $39.90 per hour, and the rate per hour billed on our original invoice, namely $9.008 per hour. The above hours are for that portion of the dredging time on which the dredge operated at reduced capacity due to obstructions encountered during dredging operations.

These obstructions were not described or set forth in the specifications covering the contract dredging.

The defendant rejected this claim.

11. Plaintiffs' bills were received in the office of John M. Anderson, State Procurement Office, contracting officer, at Columbia, South Carolina, June 30, 1937, and the bill for $9,961.62 was returned to plaintiffs for correction about July 20, 1937, received again by the contracting officer July 22, 1937, and voucher issued therefor and paid to plaintiffs July 28, 1937 in the amount of $9,961.62, which payment plaintiffs received without protest.

12. August 30, 1937 John E. Macdonald, Assistant District Director wrote the office of the State Administrator at Columbia, attention of Mr. Hooks, and referred to a conference by them held the previous afternoon, and gave his approval of claim of plaintiffs for an additional 25 percent over and above the contract price (Art. 1 of the contract),

because plaintiffs had encountered "totally unexpected and unforeseen difficulties" in dredging out the old road.

Under date of September 1, 1937 State Director Hooks wrote plaintiffs that the claim presented was too large and that Mr. John E. Macdonald, Assistant District Director and Mr. Hooks had agreed to approve an additional claim, but requested that plaintiffs submit a new claim to the Procurement Division covering 25 percent of the original claim, stating that it would receive the approval of Mr. Macdonald and himself.

13. Plaintiffs, under date of September 4, 1937, submitted the following amended claim:

Additional rental necessary on account of reduced capacity due to dredging and removal of old structures in place, riprap, square piling and sheet pile dikes encountered in the area dredged, all of which were not described in the contract specifications.

109.25 Hours at $30.892 per hour	$3, 374. 95

NOTE.—The above price per hour is based on the difference between the accepted contract rental bid price, namely $39.90 per hour, and the rate per hour billed on our original invoice, namely $9.008 per hour. The above hours are for that portion of the dredging time on which the dredge operated at reduced capacity due to obstructions encountered during dredging operations. These obstructions were not described or set forth in the specifications covering the contract dredging.

We agree to reduce our claim by $884.55 so as to bring the above amount to a figure within the 25% increase, which we understand is allowable under the existing regulations pertaining to our contract	884. 55
Amount of final claim	2, 490. 40

14. On November 24, 1937 Mr. Anderson, State Procurement Officer, advised plaintiffs that their claim and all papers in connection therewith had been referred to the General Accounting Office, Washington, D. C.

June 4, 1938, the General Accounting Office wrote plaintiffs denying the claim for the additional amount asserted by them.

15. Except for the old roadway, the materials in the area to be dredged were as described in the specifications. However, the subsurface materials in the old roadway, as set forth in Finding 6, were wholly different and were unexpected and unknown to both parties at the time of entering into the contract, and caused plaintiffs to be delayed in their operation, and prevented plaintiffs from maintaining the average production of 400 cubic yards per hour.

As shown in Finding 8, the total rental time claimed by plaintiffs is 334 hours 15 minutes, which at the rate of $39.90 per hour, the contract rate, amounts to $13,336.57. Plaintiffs were paid $9,961.62, leaving a balance unpaid of $3,374.95.

The court decided that the plaintiffs were entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

The plaintiffs agreed to furnish the defendant with a hydraulic dredge—

> * * * including floating pipe line, shore pipe line, necessary attendant plant and labor and material necessary for the efficient operation of the plant, in accordance with the specifications attached hereto, 250 Hours.
> Above equipment to be rented at the rate of $39.90 per hour.

The controversy in the case has been narrowed to this single issue: whether or not the plaintiffs are entitled to be paid for the time their dredge and equipment and labor were idle during the time the shore line was being moved by defendant's employees.

The contract provided that the plaintiffs should furnish all equipment and labor, except the labor for handling the pipe line from the shore connection. The total delay during which the pipe line was being moved by defendant's employees was 45 hours and 8 minutes. The contractors claim compensation therefor at the rate of $39.90 per hour. The defendant says that the rental to be paid was for pumping time only and, therefore, that the contractors are not entitled to be paid while their machine was standing idle.

Let it be borne in mind in the beginning that the contract was drawn by the defendant, and in cases of doubt must

be construed more strongly against it. *Callahan Construction Co.* v. *United States*, 91 C. Cls. 538.

The contract provides for rental "at the rate of $39.90 per hour." It does not say at the rate of $39.90 per pumping hour, and we are of the opinion that it did not mean to say $39.90 per pumping hour.

In the second paragraph of the contract, providing for guaranteed production, they speak not of hours, but of pumping hours. The plaintiffs were required to dredge 400 cubic yards "per pumping hour"; whereas, in the provision providing for rental it provides for $39.90 "per hour."

It would further appear that the contract did not intend that the rental should be limited to pumping hours, because in paragraph 3, under the heading of "Breakdown," it was provided that the contractors would be paid for the time the machine was broken down, not to exceed one hour in twenty-four. (If the break-down lasted more than one hour in twenty-four, it was provided that the contractors would not be paid for this excess.) Since express provision was made for payment while the machine was idle due to break-downs, it is plain that it was not meant to limit the compensation to the time the machine was engaged in pumping.

During the time the defendant's employees were changing the shore line, the contractors' equipment was on the ground, their steam was up, their men were standing around idle, and all other expenses were going on. It is only reasonable to assume that it was intended that the defendant should compensate them for the rental of their plant under such circumstances.

The defendant says that the estimated time the equipment would be needed by the defendant was 250 hours, and that the contractors were required to guarantee a production of 400 cubic yards per hour, and that the total estimated cubic yards to be dredged amounted to 100,000; and that since 400 cubic yards per hour, multiplied by the 250 hours estimated, equals the total of 100,000 cubic yards estimated to be dredged, it is to be inferred that it was intended to compensate the plaintiffs only for pumping time. We are, however, of the opinion that the considerations mentioned above are more persuasive than is this argument advanced

by the defendant. The contract was drawn by the defendant; it provided for a rental of $39.90 per hour, not per pumping hour; and it expressly provided in the case of breakdowns for payment of rental while the dredge was not pumping. We do not think it was intended to limit the rental to pumping hours; if it was, the contract failed to say so.

We are of the opinion that the plaintiffs are entitled to recover. Judgment, therefore, will be entered in favor of the plaintiffs and against the defendant for the sum of $3,374.95. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

NORTH PACIFIC EMERGENCY EXPORT ASSOCIATION, A CORPORATION, v. THE UNITED STATES

[No. 45190. Decided January 5, 1942]

On the Proofs

Agricultural Adjustment Act; purchases of flour by the United States for shipment to Philippine Islands an export transaction under the Act.—Where, under a Marketing Agreement between plaintiff, a non-profit organization, and its members, on the one hand, and, on the other, the United States, acting through the Secretary of Agriculture, for the disposal of the wheat surplus in 1933, entered into in accordance with the provisions of the Agricultural Adjustment Act, the plaintiff with the approval of the Secretary of Agriculture, as required by said act, sold certain shipments of flour to the United States Government, packed and sealed for shipment to and for use in the Philippine Islands; and where all the transactions by the plaintiff with the Government, in connection with which the instant claim arose, were proposed and carried out by plaintiff and its members concerned with the knowledge and consent of the Secretary of Agriculture through his authorized representatives; it is *held* that said sale comes within the provisions of sections 10 (f) and 17 (a) of the Agricultural Adjustment Act defining exportations of agricultural products to include exportations to the Philippine Islands, and plaintiff is accordingly entitled to recover.

The Reporter's statement of the case:

Mr. Robert F. Klepinger for the plaintiff. *Mr. Fred B. Rhodes*, and *Messrs Rhodes, Klepinger & Rhodes* were on the brief.

Mr. Elihu Schott, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. William A. Stern II*, was on the brief.

Plaintiff sues to recover $11,679.97 under a Marketing Agreement known as Agreement No. 14 between plaintiff, a nonprofit organization, and its members and the United States acting through the Secretary of Agriculture for the disposal of the North Pacific Wheat Surplus, which agreement was executed by plaintiff, its members, and the United States October 10, 1933, under and pursuant to the Agricultural Adjustment Act approved May 12, 1933 (48 Stat. 31).

The question presented is whether under the agreement mentioned and the facts and circumstances disclosed the plaintiff was entitled to receive from the defendant the difference, represented by the above-mentioned amount, between the existing and approved current market purchase price of wheat flour and the amount at which plaintiff, with the approval of the Secretary of Agriculture, sold the flour to the United States for shipment to and use by the Army and Navy Departments in the Philippine Islands.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. The plaintiff is a nonprofit corporation organized and existing under the laws of the State of Oregon and having its principal place of business in Portland, Oregon.

2. Pursuant to an act of Congress approved May 12, 1933, the same being Public Act No. 10, 73rd Congress, the defendant, represented by the Hon. Henry A. Wallace, then Secretary of Agriculture, entered into a certain contract dated October 10, 1933, designated as Marketing Agreement No. 14, and entitled "Marketing Agreement for Disposal of North Pacific Wheat Surplus." A copy of this agreement (plaintiff's Exhibit "A") is by reference made a part of this find-

ing. This agreement contained, among others, the following provisions:

Whereas, it is the declared policy of Congress, as set forth in Section 2 of the Agricultural Adjustment Act, approved May 12, 1933, as amended—

(1) To establish and maintain such balance between the production and consumption of agricultural commodities and such marketing conditions therefor, as will reestablish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the pre-war period, August 1909–July 1914;

(2) To approach such equality of purchasing power by gradual correction of the present inequalities therein at as rapid a rate as is deemed feasible in view of the current consumptive demand in domestic and foreign markets; and

(3) To protect the consumer's interest by readjusting farm production at such level as will not increase the percentage of the consumer's retail expenditures for agricultural commodities, or products derived therefrom, which is returned to the farmer, above the percentage which was returned to the farmer in the pre-war period August 1909–July 1914; and

Whereas, in the Pacific Northwest, comprising the States of Washington, Oregon, and Northern Idaho, due to lack of profitable foreign markets and the production of wheat in excess of domestic consumption, there is at this time a carry-over from the 1932 crop estimated at 25 million bushels of wheat and the producers of wheat are unable to obtain a fair price for said wheat or for the 1933 crop which is now being, or in the near future will be harvested and marketed, and such surplus of wheat now not only depresses the domestic market but occupies a considerable portion of the warehousing facilities necessary for the handling and marketing of said 1933 crop; and

Whereas, the Secretary has determined that in order to accomplish the declared policy of said Act it is necessary to bring about removal of such surplus of wheat from the depressed domestic market and that such surplus be disposed of in foreign markets, and/or to or through any public unemployment relief agencies; and

Whereas, the congestion in both the local and terminal warehouses and the depressing effect of such surplus

upon the grain market generally, presents a critical situation for the producers of wheat in said Pacific Northwest area and has created an emergency that requires urgent action; and

Whereas, pursuant to the Agricultural Adjustment Act, the parties hereto, for the purpose of correcting the conditions now obtaining in the production of wheat in the aforesaid area and the distribution thereof, and to effectuate the declared policy of said Act, desire to enter into a marketing agreement under the provisions of Section 8 (2) and 12 (b) of the Act; and

Whereas, the marketing and distribution of such surplus wheat are in both the current of interstate commerce and foreign commerce;

Now, therefore, in consideration of the mutual premises herein contained, and for the sum of one dollar in hand paid to the Association and to its members, receipt of which is hereby acknowledged by the Association and its members, the parties hereto agree as follows:

* * * * *

SEC. 3. The Association shall serve as a clearing house for arranging details of purchasing, shipping, handling, and selling the wheat and/or flour purchased for export or otherwise as herein provided. The Association shall maintain a system of accounts which shall accurately reflect the true account and condition of all such transactions. The books, records, papers, and memoranda of the Association (and of each member thereof, in so far as such books, records, papers, and memoranda pertain to this Agreement or acts done pursuant thereto) shall, during the usual hours of business, be subject to the examination of the Secretary to assist him in the furtherance of his duties with respect to this agreement, including verification by the Secretary of the information furnished on the forms hereinafter referred to. The Association, and each member thereof, shall, from time to time, furnish information to the Secretary on and in accordance with forms to be supplied by him.

SEC. 4. The Secretary may, from time to time, give written instructions to the Executive Committee of the Association, or its duly appointed managing agent, directing such Association to contract for the purchase of wheat, produced in the aforesaid Pacific Northwest area, for the purpose hereinafter provided. Such written instructions may, in the discretion of the Secretary, include any or all of the following:

(a) The quantity of wheat to be so purchased, which purchases shall be made on the basis set forth in Exhibit A attached hereto and by this reference made a part hereof;

(b) The price to be paid for the same and the terms of said purchase; and

(c) The persons from whom such purchases are to be made, whether from producers, associations of producers, local or terminal warehouses, or others.

It is agreed that the Association shall not have at any one time outstanding net purchases in excess of one million bushels of wheat against which excess there are no outstanding sales or contracts for sales.

The Association and its members hereby agree to carry out and fulfill such instructions to the best of their ability.

SEC. 5. With respect to the wheat so purchased, the Association shall receive written bids from its members, each day, for the purchase from the Association and the sale in the export trade of any part of such wheat in the form of wheat or flour. Such bids shall include the following:

(a) The amount of wheat offered to be so purchased in the export trade as wheat or flour;

(b) The Sales Prices at which such wheat and/or flour shall be sold in the export trade and the time of shipment. The sales of the wheat, if any, shall be made on the basis of No. 2 bulk, f. o. b. ship. The sales of the flour, if any, shall be on the F. A. S. basis for steamer loading at Portland and Astoria, Oregon; and Tacoma and Seattle, Washington;

(c) The terms of such proposed sale and shipment including the C. I. F. bid and the specific deductions made in establishing the F. O. B. or F. A. S. price; and

(d) The port or ports of destination of the wheat or flour to be thus sold.

Copies of all such bids shall be submitted to the Secretary, who will then advise in writing the Executive Committee, or its duly appointed managing agent which bids to accept, if any. The Association agrees to accept such specified bids and to notify those members whose bids have been thus accepted. The Association further agrees to transfer contracts for a sufficient amount of wheat, purchased pursuant to Section 4 hereof, to permit the individual members to carry out and fulfill their bids which have been accepted by the Association. The members agree to pay the purchase price for the con-

tracts so transferred pursuant to the terms of such contracts.

The Secretary may, from time to time, give written instructions to the Executive Committee, or its duly appointed managing agent, to sell in the export trade or to any public unemployment relief agency any part of the wheat so purchased pursuant to Section 4 hereof, in the form of wheat or flour. Such written instructions may, in the discretion of the Secretary, include any or all of the following:

(*a*) The amount of wheat and/or flour to be sold;

(*b*) The Sales prices at which such wheat and/or flour shall be sold. The sales of the wheat, if any, shall be made on the basis of No. 2 bulk, f. o. b. ship. The sales of the flour, if any, shall be made on the F. A. S. basis for steamer loading at Portland and Astoria, Oregon; and Tacoma and Seattle, Washington;

(*c*) The terms of such proposed sale and shipment including the C. I. F. bids and the specific deductions made in establishing the F. O. B. or F. A. S. price;

(*d*) The port or ports of destination of the wheat and/or flour to be thus sold; and

(*e*) The purchaser to whom the wheat and/or flour shall be thus sold.

The Association and its members hereby agree to carry out and fulfill such instructions to the best of their ability.

It is expressly understood and agreed that any wheat that is purchased pursuant to the written directions of the Secretary as provided in Section 4 hereof shall not be sold except as provided in this Section 5.

* * * * *

SEC. 7. The Association shall obtain from each member which shall have made sales, pursuant to Section 5, verified statements with respect to such sales, on forms to be supplied by the Secretary. Such statements shall include the Sales Price for all the wheat and flour sold and the cost incurred with respect to the same in accordance with the schedules set forth in Exhibits B and C. There is attached hereto, marked Exhibit B, a schedule of the cost of handling, shipping, storing, and other charges with respect to the wheat to be purchased and sold. There is also set forth in Exhibit B an item of "selling costs" to be included among the costs to be allowed in connection with each sale made pursuant to Section 5 hereof. There is attached hereto, marked

Exhibit C, a schedule of the costs of the processing of wheat into flour, handling, and packing of the same.

Any provisions of the schedule in Exhibits A, B, and C may be changed from time to time by agreement between the Association and the Secretary.

The term "Purchase Price" as used in this Agreement shall be deemed to be the price provided for in the wheat contracts purchased pursuant to Section 4 hereof and paid, pursuant to terms of such contracts, as provided in Section 5 hereof with adjustments as provided in Exhibit A.

The term "Sales Price" as used in this Agreement shall be deemed to be the F. O. B. or F. A. S. price specified in the bid submitted in connection with any sale of the wheat and/or flour made pursuant to Section 5 hereof.

The term "Net Sales Price" as used in this Agreement shall be deemed to be the Sales Price less the costs incurred (pursuant to the schedules set forth in Exhibit B or Exhibit C) in connection with any wheat sold as wheat or flour.

SEC. 8. The Association shall, if any part of the wheat purchased is sold as either wheat and/or flour, pursuant to Section 5 hereof, present to the Secretary a verified statement, on forms to be supplied by the Secretary, showing the Purchase Price of such wheat, the Sales Price, and the Net Sales Price for such wheat and/or flour. The Secretary agrees to pay to the Association within a reasonable time of the receipt of such statement and other documents which shall indicate to the satisfaction of the Secretary that such wheat and/or flour has been exported, or otherwise disposed of pursuant to Section 5 hereof an amount equal to the difference between the Purchase Price and the Net Sales Price.

3. During the year 1934, as a result of certain requisitions made by defendant's supply officers in the Philippine Islands, certain of plaintiff's members made bids and entered into contracts with the United States for the sale of flour to be delivered to the supply officers of the War and Navy Departments, f. o. b. ships, at designated ports in the United States for shipment by the defendant on other than U. S.-owned ships to the Philippine Islands.

A copy of one of these contracts, typical of all the others, and the papers upon which it was made are in evidence as

plaintiff's Exhibit "B" and are by reference made a part of this finding. These contracts were made and carried out with the knowledge and approval of the Secretary of Agriculture acting for and representing the United States in and under the Marketing Agreement of October 10, 1933, *supra.*

4. Thereafter plaintiff sold flour to its members at the price set forth in the contract with the War and Navy Departments in order to carry out the contracts, and in accepting bids by its members for the flour plaintiff had the approvel of the Secretary of Agriculture, acting through his duly designated and authorized representative.

Copies of the approval and the papers on which it was granted, typical of all the contracts, are in evidence as plaintiff's Exhibit "C," which are by reference made a part of this finding.

5. The contract prices of the flour sold to the War and Navy Departments, as outlined above, for shipment to the Philippine Islands were less than the current continental United States market prices for the wheat. As a result of these sales during 1934, the defendant, acting by and through the Secretary of Agriculture, paid plaintiff on March 23, 1934, $11,679.97, computed under and in accordance with sections 4, 5, 7, and 8 of the Marketing Agreement, which amount represented the difference between the current market purchase prices for the wheat purchased by plaintiff and sold in the form of flour and the prices paid by defendant therefor March 8, 1934, and thereafter during that year under the contracts mentioned in findings 3 and 4.

6. Prior to May 20, 1937, the plaintiff became entitled to receive from the defendant under the Marketing Agreement of October 10, 1933, on account of certain other purchases and sales of grain or flour made pursuant to the terms of the Marketing Agreement and duly approved by the Secretary of Agriculture, or by his designated and duly authorized representative, the sum of $19,477.76, less certain proper and authorized deductions about which there were no disputes, amounting to $6,915.07, or a net balance of $12,562.69. Shortly prior to May 20, 1937, G. F. Allen, chief disbursing officer of the Agricultural Adjustment Administration, Department of Agriculture, at San Francisco, submitted to

the General Accounting Office for preaudit and approval this disbursement with a further deduction and offset in favor of the United States against the amount otherwise shown to be due by plaintiff of $11,679.97 theretofore paid plaintiff under the Marketing Agreement by reason of sales transactions of flour to the Government in 1934, leaving a net balance in favor of plaintiff of $882.72 instead of $12,562.69.

The General Accounting Office approved this offset in its preaudit, and on May 20, 1937, the said disbursing officer of the Agricultural Adjustment Administration at San Francisco prepared a schedule of disbursements showing the deductions, which included the $11,679.97, totaling $18,595.04, as "counter-adjustments" from the total amount due plaintiff of $19,477.76, and the balance of $882.72 so arrived at was paid, accompanied by a statement from the chief disbursing officer as follows: "This office has been advised that such sales [sales of flour to the United States in 1934, as hereinbefore detailed] lack the essential characteristics of a 'sale in the export trade,' and that no indemnities could properly be paid under the [marketing] agreement with respect to such sales. Therefore, an offset in the amount of $11,679.97 is being made against the otherwise approved amount of a claim presented by you."

Thereupon the plaintiff submitted to the Secretary of Agriculture a claim for the amount of $11,679.97 deducted by the disbursing officer, and the Secretary of Agriculture at the request of plaintiff sent the claim to the Comptroller General of the United States. The Comptroller General in an opinion contained in a letter to the plaintiff dated September 16, 1938, held that the payment of the $11,679.97 in 1934 was illegal, as not being authorized by the Marketing Agreement, and that the offset was proper, and disallowed the claim. This denial of the claim was affirmed by him on a review in an opinion contained in a letter to plaintiff dated June 16, 1939.

Copies of the "Schedule of Disbursements" of May 20, 1937, plaintiff's Exhibit D, and of the opinions of the Comptroller General, plaintiff's Exhibits E and F, respectively, are by reference made a part of this finding.

The opinion of the Comptroller General of September 16, 1938, was as follows:

Your claim No. 0477700 in the amount of $11,679.97 representing refund of amounts deducted from voucher No. 12–79868 of the June 1937 account of G. F. Allen, as differential payment of flour furnished the War and Navy Department under various contracts for export to the Philippine Islands, has been carefully examined and it is found that no part thereof may be allowed for the reasons hereinafter stated.

Marketing Agreement No. 14 executed by the Secretary of Agriculture on October 10, 1933, provided in part for the removal of surplus wheat from the depressed domestic market, its export and disposal in foreign markets and for payment of a differential of the net purchase price against the wheat supplied in such sales and the sale price of the flour. It was further provided that the North Pacific Emergency Export Association and its members should purchase surplus 1932 crop wheat at prices to be prescribed by the Secretary of Agriculture (Section 4), and sell such wheat, or flour processed therefrom in the *export trade* or to any public unemployment agency designated by the Secretary of Agriculture (Section 5), at prices acceptable to the Secretary and it was expressly understood and agreed that any wheat purchased pursuant to instructions of the Secretary as provided in section 4 *should not* be sold except as provided in section 5. Upon purchase of such wheat and sale of the wheat, or flour processed therefrom, in strict accordance with the agreement the association was to be paid for the benefit of participating members certain differentials between the purchase and sale prices in accordance with schedules set forth in and made parts of the agreement.

Sales of the involved flour processed from 1932 wheat to the Army and Navy were not sales either in the export trade or to public unemployment relief agencies, and were not in compliance with the agreement so as to entitle the association or its members to differential payments under said agreement. The Army and Navy of the United States are essentially domestic in character and by reason of their ramifications and far-flung operations are substantial and presumably valuable domestic consumers of domestic products. Neither department is engaged in the *export trade* in any common-sense or recognized acceptation of the term, and the mere fact that they purchase materials, articles and supplies packed,

marked and intended for shipment to and use in the Philippine Islands or elsewhere does not change the complexion of their transactions or constitute the departments either traders or exporters. Their purchases in this country whatever their ultimate destination, are distinctly domestic purchases for the use of domestic agencies of the Government and the sales to them cannot be reasonably regarded as sales in the export trade. Moreover, the sales to them herein involved not only were not in conformity with the agreement, but would appear to have been in contravention of its terms and purposes, for had these sales not been consummated, no doubt the Army and Navy would have supplied their needs by purchase of flour from other sources and probably processed from the wheat of the 1933 crop.

From the facts presented there is no legal basis for payment of any amount as diffierential under the agreement in addition to the contract price.

I therefore certify that no balance is found due you from the United States.

7. Plaintiff made written request to the Comptroller General to review the disallowance of September 16, which he did, and in a letter to plaintiff of June 16, 1939, he discussed the matter in considerable detail and concluded that "* * * in view of the unambiguous and unequivocal limitations of the Marketing Agreement, there is no legal basis for the payment of the claim, and the disallowance of September 16, 1938 must be and is sustained."

8. Throughout the period of the transactions between the United States and the plaintiff, as hereinbefore set forth, and at all times after they were finally consummated and payment was made in connection therewith, the United States, acting by and through the Secretary of Agriculture, and the plaintiff interpreted such transactions as coming within and being covered by the terms and provisions of the Marketing Agreement of October 10, 1933. The Secretary of Agriculture has at no time made any decision to the contrary.

June 29, 1934, the office of the General Counsel of the Agricultural Adjustment Administration of the Department of Agriculture by the assistant general counsel gave an opinion to the Grain Section of the Agricultural Adjustment Administration of the Department, as follows:

(*a*) The North Pacific Emergency Export Association has the power to approve the sale of flour to the United States Army against proof that such flour is for foreign destination. Such a sale is one which may fairly be said to look to "the removal of * * * surplus of wheat from the depressed domestic market * * *" as per the terms and conditions of the Marketing Agreement. It would appear that a foreign market is any market other than the *domestic* market.

(*b*) The sale of wheat or flour for consumption in the Philippine Islands is correctly classified as a sale looking to a "Foreign" market. * * *

The court decided that the plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The solution of the question involved in this case as to the right of plaintiff to be paid by the defendant the amount of $11,679.97 must be governed by the substance of the arrangements and transactions between plaintiff and the Government and the intentions of the plaintiff and the United States as evidenced by the Marketing Agreement of October 10, 1933, the Act of May 12, 1933, and the facts and circumstances surrounding the sales of flour to the United States, packed and sealed, for shipment to and use in the Philippine Islands.

The pertinent facts concerning the agreements and transactions between plaintiff and the defendant which give rise to the claim presented in this suit are set forth in considerable detail in the findings. At the outset it should be stated that the Marketing Agreement of October 10, 1933, provided that the Secretary of Agriculture might, by written designation, appoint any officer or employee of the Department of Agriculture, or any person or persons, to act as his duly authorized representative in connection with any of the provisions contained in that agreement to be performed by the Secretary. All the transactions by plaintiff with the Government, in connection with which the claim here involved arose, were proposed and carried out by plaintiff and its members concerned with the knowledge and approval of the Secretary of Agriculture through his duly designated and authorized representative, or representatives.

The plaintiff association was located at Portland, Oregon, and its territory covered the states of Washington, Oregon, and Northern Idaho; its business was that of dealing in and disposing of wheat and flour from the 1932 crop surplus estimated at about 25,000,000 bushels. The membership of plaintiff was limited to producers or an association of producers of wheat or flour in the territory mentioned and membership in the association was subject to approval of the Secretary of Agriculture. The operations and business transactions of plaintiff and its members were conducted by an executive committee of nine members and were subject to the written approval of the Secretary, one of the members of the committee being a duly designated and authorized representative of the Secretary of Agriculture. Subject to and with the approval of the Secretary, the executive committee was authorized to appoint a managing agent to act for the association subject to directions of the executive committee, and any and all actions taken by the managing agent, the executive committee, or by the association had to have the approval of the Secretary of Agriculture or his duly authorized representative. All such acts and transactions were so approved and the plaintiff and its members conformed to and strictly complied with these requirements of the Marketing Agreement.

Section 3 of the Marketing Agreement provided that the association should serve as a clearing house for arranging details of purchasing, shipping, handling, and selling wheat and/or flour purchased for export.

Section 4 of the Marketing Agreement provided for the giving by the Secretary from time to time of written instructions to the executive committee or its managing agent directing plaintiff to contract for the purchase of wheat produced in the Pacific Northwest area, above mentioned, for the purpose therein provided, which instructions included, among others, the price to be paid by plaintiff for the wheat and the terms of the purchase. It was further provided that plaintiff should not have at any one time outstanding net purchases in excess of 1,000,000 bushels of wheat against which excess there were no outstanding sales or contracts for sale, and plaintiff and its members agreed

to carry out and fulfill all instructions of the Secretary of Agriculture to the best of their ability.

Section 5 of the Marketing Agreement provided that with respect to the wheat so purchased under instructions from the Secretary, as provided in section 4, the plaintiff "shall receive written bids from its members, each day, for the purchase from the Association and the sale in the export trade of any part of such wheat in the form of wheat or flour. Such bids shall include the following: (*a*) The amount of wheat offered to be so purchased in the export trade as wheat or flour; (*b*) The Sales Prices at which such wheat and/or flour shall be sold in the export trade and the time of shipment. The sales of the wheat, if any, shall be made on the basis of No. 2 bulk, f. o. b. ship. The sales of the flour, if any, shall be on the F. A. S. basis for steamer loading at Portland and Astoria, Oregon, and Tacoma and Seattle, Washington; (*c*) The terms of such proposed sale and shipment including the C. I. F. bid and the specific deductions made in establishing the F. O. B. or F. A. S. price; and (*d*) The port or ports of destination of the wheat or flour to be thus sold."

Section 5 of the Marketing Agreement further provided and required that copies of all such bids received by plaintiff association from any of its members must be submitted to the Secretary "who will then advise in writing the executive committee, or its duly appointed managing agent which bids to accept, if any." Plaintiff agreed to accept only such bids as were approved by the Secretary and to notify those of its members whose bids had been thus accepted. Plaintiff further agreed, and was required after approval of the transaction by the Secretary, to transfer contracts for a sufficient amount of wheat purchased pursuant to section 4 of the agreement to permit the individual member or members whose bids had been approved and accepted to carry out and fulfill their bids. It was further expressly understood and agreed by plaintiff, its members and the Government that any wheat purchased by plaintiff pursuant to the written directions of the Secretary, as provided in section 4, "shall not be sold except as provided in section 5."

Section 7 of the Marketing Agreement required plaintiff

to obtain from each of its members, who had made sales pursuant to section 5, verified statements with respect to such sales on forms furnished by the Secretary; that such statements should include the sales price for all the wheat and flour sold and the cost incurred with respect to the same in accordance with schedules B and C of the Marketing Agreement. The term "purchase price" was defined by the Marketing Agreement to be the price provided for in the wheat contracts purchased pursuant to section 4 and paid pursuant to the terms of such contracts, as provided in section 5, with adjustments as provided in schedule A. The term "net sales price" was defined by the agreement to be the sales price of wheat or flour less the costs incurred pursuant to schedules B or C in connection with any wheat sold as wheat or flour.

Section 8 provided that as to any part of the wheat purchased and sold either as wheat or flour, pursuant to section 5, the plaintiff should present to the Secretary a verified statement, on forms to be supplied by the Secretary, showing the purchase price of such wheat, the sales price, and the net sales price for such wheat or flour. The section further provided that "The Secretary agrees to pay to the Association within a reasonable time of the receipt of such statement and other documents which shall indicate to the satisfaction of the Secretary that such wheat and/or flour has been exported, or otherwise disposed of pursuant to Section 5 hereof an amount equal to the difference between the Purchase Price and the Net Sales Price."

Section 9 of the Marketing Agreement provided that "out of the funds thus paid to plaintiff" by the United States through the Secretary of Agriculture, the plaintiff should reimburse itself for the cost which it incurred over and above the purchase price prior to the transfer of such wheat contracts to its members and pay to those members to whom the contracted wheat had been transferred by plaintiff, pursuant to section 5, an amount equal to the difference between the purchase price which such members had paid for the contracted wheat and the net sales price received in connection with the sale and delivery of such wheat or flour.

Sections 10 (f) and 17 (a) of the Agricultural Adjustment Act of May 12, 1933, Tit. 7, U. S. Code, sections 610 (f) and 617 (a) define exportations of agricultural products to include exportations to the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and the Island of Guam. And section 17 (a) of the Agricultural Adjustment Act as amended (48 Stat. 670, 676, section 12) likewise includes the Philippine Islands in the term "exportation to any foreign country."

While the Marketing Agreement containing the provisions above discussed was in effect, and during the months of February, March, July, and August 1934, the supply officers of the U. S. Army and Navy at Cavite, Philippine Islands, in charge of the acquisition of supplies for use thereat, prepared and sent requisitions for certain quantities of flour to the appropriate supply officers of the Army and Navy in the western portion of the United States. For the purpose of this case we will discuss only the requisition of February 13, 1934, of the Naval Supply Officer at Cavite, P. I., for the purchase and shipment of 200,000 pounds of flour (see finding 4). This requisition was received by the Naval Supply Officer at Puget Sound Navy Yard, Bremerton, Washington, who thereafter, in the purchase and shipment of flour, acted for the United States as contracting officer and for the Naval Suply Officer at the Navy Yard at Cavite, Philippine Islands. In this transaction the United States acted through J. F. Hatch, captain, Supply Officer, U. S. N. Circular letters were sent by the Government through its supply officer to members of plaintiff association for bids for the quantity of flour desired to be packed and sealed in 50-pound tins to be delivered f. o. b. Wharf, Terminal #4, Portland, Oregon, and to be shipped under Government Bill-of-Lading to the Supply Officer, Navy Yard, Cavite, P. I. The Terminal Flour Mills Company at Portland, Oregon, a member of plaintiff association and a party to the Marketing Agreement of October 10, 1933, submitted to the Government an offer to furnish and deliver f. o. b. Portland the 200,000 pounds of flour from the 1932 wheat-crop surplus at a certain price per pound. The bid as prepared and submitted by The Ter-

minal Flour Mills Company was regarded by plaintiff as a transaction under and in accordance with the Marketing Agreement with the United States, and the making of the bid, the resulting contract and the consummation of the transaction were ratified and approved by the Secretary of Agriculture. The unit price for the flour called for was 0.0319 a pound, or a total amount of $6,380. This was less than the current continental United States market price as fixed by the United States through the Secretary of Agriculture for wheat contracted for by plaintiff for purchase, and from whom The Terminal Flour Mills Company was required to acquire and did acquire wheat for the production of flour to be sold and delivered at the price for which plaintiff had contracted for it. The difference in this instance between the purchase price of wheat and the net sales price of the flour produced therefrom, packed and delivered for shipment to the Philippine Islands as defined by sections 4, 5, and 7 of the Marketing Agreement, above described, was $1,384.12. Other like instances, three in number, produced excess net sales prices over purchase prices of wheat, which, when added to the excess of $1,384.12, just mentioned, totals $11,679.97 now sought to be recovered by plaintiff in the instant case.

The United States, acting through Captain Hatch, its supply officer at Bremerton, made an award to The Terminal Flour Mills Company, a member of plaintiff association, for the 200,000 pounds of flour for $6,380. This award was made February 21, 1934, and on or about the same date the standard form of Government contract for supplies was executed by the United States and The Terminal Flour Mills Company for the 200,000 pounds of flour under the terms and conditions above-mentioned. The flour was delivered to the defendant, packed and sealed, f. o. b. Portland, and was shipped March 8, 1934, on the S. S. *California*, of the States Steamship Line, consigned to the Supply Officer of the Navy Yard at Cavite, P. I. On the same date, plaintiff was paid by the defendant $6,380 specified in the supply contract with the Government represented by its supply officer at Bremerton, Washington, and, on March 23, 1934,

upon the necessary documents prepared and approved by the Secretary of Agriculture disclosing all the details of the transaction as called for and required under the Marketing Agreement of October 10, 1933, accompanied by a voucher for $1,384.12 approved by the Secretary of Agriculture and the Comptroller of the Department of Agriculture, plaintiff was paid the amount of $1,384.12 by A. O. Walsh, Major, F. D., Vancouver Barracks, Washington, by check #101790 dated March 23, 1934 on the Treasury of the United States. The certificate of the Secretary of Agriculture by the Comptroller of the Department of Agriculture was as follows:

> I certify that I have verified the transactions within enumerated and as set forth in detail on forms attached; that said transactions were in accordance with terms of the contracts approved by the Secretary of Agriculture; that the transactions listed are in accordance with the agreement noted herein (Marketing Agreement Series, Agreement 14) and that verification thereof has been made by check against the books and records maintained by the Association pursuant to section 3 of said agreement, and this voucher is hereby approved for payment in the amount of $1,384.12.

Thus the matter stood for a little more than three years when, on May 20, 1937, G. F. Allen, chief disbursing officer of the Agricultural Adjustment Administration, Department of Agriculture, at San Francisco, California, prepared a schedule of disbursements on which was shown an amount of $19,477.76 admittedly due plaintiff under the Marketing Agreement in connection with transactions, about which there was no dispute, and a deduction therefrom in the amount of $11,679.97 theretofore in 1934, approved by the Secretary of Agriculture and paid to plaintiff on account of the transactions hereinbefore described, carried out and concluded under the terms of the Marketing Agreement. Other counter-adjustments, about which there were no disputes, were also made on this schedule, all of which totalled $18.595.04, leaving a balance of $882.72, which was paid. This schedule of disbursement was transmitted before payment to the General Accounting Office for preaudit and was approved. This was done without the knowledge of

the plaintiff. The disbursing officer, when making payment of the amount of $882.72, attached to the disbursement schedule sent to plaintiff a statement that "This office has been advised that such sales [in connection with which the $11,679.97 had been paid] lack the essential characteristics of a 'sale in the export trade' and that no indemnities could properly be paid under the agreement with respect to such sales."

The United States, acting through the Secretary of Agriculture, has not at any time decided that the transactions and sales hereinbefore described and referred to in the schedule of the disbursing officer above-mentioned did not come within and were not covered by the Marketing Agreement of October 10, 1933, or that the amount of $11,679.97 paid thereunder to plaintiff by his direction could not properly be paid under the Marketing Agreement with respect to such sales. On June 29, 1934, the office of general counsel of the Agricultural Adjustment Administration, Department of Agriculture, considered an inquiry from the Grain Section with reference to transactions of the character hereinbefore described and, on that date, in an opinion by the assistant general counsel written to the Grain Section of the Agricultural Adjustment Administration, it was stated: "To give answer to your inquiry of June 26, the undersigned is of the opinion that (*a*) The North Pacific Emergency Export Association has the power to approve the sale of flour to the U. S. Army against proof that such flour is for foreign destination. Such a sale is one which may fairly be said to look to 'the removal of * * * surplus of wheat from the depressed domestic market * * *' as per the terms and conditions of the Marketing Agreement. It would appear that a foreign market is any market other than the *domestic* market; (*b*) the sale of wheat or flour for consumption in the Philippine Islands is correctly classified as a sale looking to a 'foreign' market."

On September 16, 1938, and again on June 16, 1939, the General Accounting Office, in opinions sent to plaintiff, held that the "unambiguous and unequivocal limitations of the Marketing Agreement" of October 10, 1933, showed that the

sales and the transactions in connection with which the United States, by direction of the Secretary of Agriculture, had paid plaintiff $11,679.97 were not covered and did not come within the terms of the Marketing Agreement, and that there was no legal basis for payment of the amount. The theory upon which the General Accounting Office based this conclusion, as the opinions show, was a technical interpretation of the terms "domestic transactions," "export trade," "trade or trader"; upon that interpretation it was held in substance that the Marketing Agreement did not apply and could not be held to apply to transactions of the character involved with the United States; that any purchase by the United States was entirely a domestic transaction and could not be regarded as looking to a "foreign" market; that the United States was not engaged in trade or as a trader and that no purchase by it, even though for shipment and use at a point defined by the statute, which was a part of the Marketing Agreement, and under which the agreement was made, could be regarded as a sale in the "export trade."

We are of opinion from all the facts and circumstances disclosed by the record, the relationship of the parties, the character of the transactions and the intention of the parties, as clearly evidenced by the practical construction which they placed upon the agreement between them, that the contemporaneous interpretation and view taken by the Secretary of Agriculture and the view of the Assistant General Counsel of the Agricultural Adjustment Administration were correct and that the conclusion of the General Accounting Office was erroneous. The practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed by the courts to be of great, if not controlling, influence. *Baltimore* v. *Baltimore and Ohio Railroad Co.*, 10 Wall. 543; *Brooklyn Insurance Co. of New York* v. *Dutcher*, 95 U. S. 269; *Old Colony Trust Co.* v. *City of Omaha*, 230 U. S. 100. The meaning of the contracting parties is the contract. *Whitney* v. *Wyman*, 101 U. S. 392. The intent of the parties prevails whenever it can be as-

certained. *George* v. *Tate*, 102 U. S. 564. There cannot be any doubt in this case as to what the parties meant and what they intended; that is conclusively proved by their acts and conduct with full knowledge of the facts.

The technical meaning of the terms above referred to and discussed in the opinion of the General Accounting Office, and here relied upon by counsel for the defendant, does not in the circumstances disclosed help the defendant's case or hinder the plaintiff's claim. Actually and as a practical matter the transactions constituted exportations of flour, as exportations were defined in the statute and intended under the Marketing Agreement as it was contemporaneously interpreted and applied by the plaintiff and the United States. The United States got the flour which was purchased for shipment to the Philippine Islands for an amount, including the amount here involved, which did not exceed but only equaled the current market price. This price the United States would have had to pay, and perhaps more, as profit, had the flour been obtained independently of the Marketing Agreement. A designated representative of the Secretary of Agriculture was an active member of the controlling executive committee of the plaintiff association; its managing officer was appointed with the approval of the Secretary and was subject to the direction of the Secretary; and all the acts and transactions of plaintiff association and its members under the Marketing Agreement were subject to the direction and control of the United States through the Secretary of Agriculture. Nothing that was done was illegal in the sense that it was prohibited or that the Secretary of Agriculture, acting for and on behalf of the United States, exceeded the scope of his authority.

Judgment will be entered in favor of plaintiff for $11,-679.97. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

MASTERBILT PRODUCTS CORPORATION v. THE UNITED STATES

[No. 44957. Decided January 5, 1942]

On the Proofs

Excise tax; automobile accessories.—Where the plaintiff sold and delivered cigarette lighters and dispensers, which were mechanical devices for automatically segregating, lighting, and ejecting cigarettes from a container, and which were supplied with a removable bracket for the purpose of being attached to the steering post of an automobile; and where said device was advertised as a safety device which would enable a smoker driving a car to obtain a lighted cigarette without taking his eyes from the road; it is *held* that the device, although it could be attached to a table or desk without change or variation of its basic mechanics, was primarily adapted for use in motor vehicles, that it was so intended to be used, and that accordingly it was taxable as an automobile accessory under the provisions of section 606 (c) of the Revenue Act of 1932, as extended, and plaintiff is accordingly not entitled to recover.

Same.—Articles primarily adapted for use in motor vehicles are to be regarded as parts or accessories of such vehicles, even though there has been some other use of the articles for which they are not so well adapted. *Universal Battery Co.* v. *United States*, 281 U. S. 580, 584.

The Reporter's statement of the case:

Mr. Henry Woog for the plaintiff.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. The plaintiff is a corporation organized under the laws of the State of New York and having its place of business in the City, County, and State of New York.

2. The plaintiff, during the twelve months of June 1935 to June 1936, sold and delivered 120,000 cigarette lighters and dispensers for automobiles at the price of $0.84½ per

lighter. These cigarette lighters and dispensers were mechanical devices for automatically segregating, lighting, and ejecting a cigarette from a container holding a quantity of cigarettes. By opening a cover or drawer of the container, a cigarette is automatically segregated and aligned with the heating element contained therein, lighting the cigarette ready for use. An electric current is required to furnish the necessary heat. This electric current may be supplied from a battery such as is used in connection with an automobile or other source; but if the ordinary house current is used as the source of supply, it is necessary to use either a transformer or a resistor or some similar device, otherwise the current would be too strong for the purpose of operation and burn out the lighting element.

3. The cigarette lighters and dispensers sold by the plaintiff were supplied with a removable bracket for the purpose of attaching it to the steering post of an automobile. It could be attached to a motorcycle or even a desk or table without change or variation in the basic mechanics of the device by using a different kind of a bracket, but there is no evidence of the device being used other than on automobiles.

The lighters and dispensers so sold by plaintiff were not essential to the operation of the vehicles to which it was intended they should be attached, but they were intended to be used in connection with the operation of automobiles and this was their primary use.

4. When affixed to an automobile in the manner set forth above, the device enabled a smoker who was driving the car to obtain a lighted cigarette without taking his eyes off of the road and the device was advertised by plaintiff as an automobile safety device.

5. No excise returns were made and no excise taxes were paid on the sales of the lighters and dispensers referred to above.

6. The Collector of Internal Revenue assessed the tax in the amount of $2,124.67 on the sale of said lighters as taxable under Section 606 (c) of the Revenue Act of 1932 as ex-

tended. The plaintiff, in August 1938, paid the tax in full with interest thereon in the amount of $2,440.84.

September 8, 1938, plaintiff filed a claim for refund of the taxes so paid on the ground that the cigarette lighters and dispensers were not parts or accessories of automobiles but were adapted for use also on house models, ash receivers, etc.

7. On May 2, 1939, the Commissioner of Internal Revenue rejected the plaintiff's claim.

The court decided that the plaintiff was not entitled to recover.

Opinion *per curiam:* The evidence shows that the plaintiff during the period involved in the case sold and delivered to Brown and Williamson Tobacco Corporation 120,000 cigarette lighters and dispensers for automobiles. These cigarette lighters and dispensers were mechanical devices for automatically segregating, lighting, and ejecting a cigarette from a container holding a quantity of cigarettes. These lighters were supplied with a removable bracket for the purpose of being attached to the steering post of an automobile. They could be attached to a motorcycle or even a desk or a table without change or variation of the basic mechanics of the device by using a different kind of a bracket but there is no evidence of the device being actually used other than on automobiles.

These lighters and dispensers so sold by plaintiff were intended to be used in connection with the operation of automobiles and this was their primary use but they were not essential to the operation of the vehicle to which it was intended they should be attached. When affixed to an automobile in the manner above set forth, the device enabled a smoker who was driving a car to obtain a lighted cigarette without taking his eyes off of the road and the contrivance was advertised by the plaintiff as an automobile safety device.

The Collector of Internal Revenue assessed a tax on the sale of these lighters under Section 606 (c) of the Revenue

Act of 1932 as extended (47 Stat. 169, 262; 48 Stat. 680, 683). The plaintiff paid the tax so assessed together with interest thereon and thereafter filed a claim for a refund of the taxes so paid on the ground that the cigarette lighter and dispenser so sold were not parts or accessories of automobiles but were adapted for use also on house models, ash receivers, etc. The Commissioner of Internal Revenue rejected this claim and the plaintiff brings suit to recover the amount of the tax and interest paid.

The Supreme Court in the case of *Universal Battery Co.* v. *The United States*, 281 U. S. 580, 584, prescribed a rule for determining what devices were subject to tax. This rule was as follows:

> * * * It is that articles primarily adapted for use in motor vehicles are to be regarded as parts or accessories of such vehicles, even though there has been some other use of the articles for which they are not so well adapted.

The findings show that the device sold was primarily adapted for use in motor vehicles; that it was so intended to be used, and that it was advertised as a safety device in the operation of automobiles which enabled the operator of a car to obtain a lighted cigarette without taking his eyes from the road.

The evidence shows that the device could be made to work when attached to a table, desk, or ash receiver but it could not be so operated under the ordinary house current and no suggestion is made as to how any advantage could be gained except when used in connection with an automobile. We think it is quite plain that the tax was properly imposed under all of the court decisions.

Plaintiff's petition must be dismissed and it is so ordered.

JAMES CARLISLE BASKIN v. THE UNITED STATES

[No. 45522. Decided January 5, 1942]*

On Defendant's Motion to Dismiss

Right to sue for salary where employment was terminated on charges.—Where it is shown by the petition that plaintiff's employment in the Federal Service as a prison guard was first suspended and later completely terminated upon written charges which, so far as that position was concerned, were never vacated or set aside and plaintiff was never restored to that position, or advised that he would be so restored, at the salary for which he brings suit; it is *held* that the action of the proper Government officials was in accordance with the statute and the regulations of the Civil Service Commission, and is not subject to review by the Court of Claims. *Burnap* v. *United States*, 53 C. Cls. 605, 252 U. S. 512, and other cases cited.

Same; soldier honorably discharged.—The fact that plaintiff in the instant case was an honorably discharged soldier does not affect the decision. *Keim* v. *United States*, 177 U. S. 290, and *Medkirk* v. *United States*, 44 C. Cls. 469, cited.

Same.—Where the Director of Prisons agreed that if plaintiff, then under suspension, would make application for leave without pay, in order that he might apply for transfer to some other Government position; and where such agreement was carried out and such application for transfer was made; it is *held* that this did not give plaintiff the right to demand the position from which he had been removed or the pay thereof.

Mr. Edgar Turlington for plaintiff. *Messrs. Robert & McInnis* were on the brief.

Mr. Mortimer B. Wolf, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The facts sufficiently appear from the opinion of the court.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiff brought this suit August 1, 1941, to recover \$6,845 as salary at the rate of \$1,680 per annum from January 15, 1936, less \$2,605 earned in private employment subsequent to that date.

*Certiorari denied April 27, 1942.

Plaintiff is a citizen and resident of Bishopville, South Carolina. He served in the United States Army as a first lieutenant from August 31, 1917, to June 18, 1919, when he was honorably discharged. From March 1, 1928, he was employed in the United States Prison Service, Department of Justice, under the Warden of the U. S. Penitentiary at Lewisburg, Pennsylvania, having been appointed to that service and duly qualified after examination, in accordance with the regulations of the Civil Service Commission. He was a classified employee in the Civil Service and, as such, was entitled to the protection of the provisions of section 6 of the Act of August 24, 1912, Title 5, U. S. Code, section 652, which provides that no person in the classified service shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of same and of any charges preferred against him, and be furnished with a copy thereof, and shall also be allowed reasonable time for personally answering the same in writing. As an honorably discharged soldier he was entitled to the benefits provided for in section 648, Title 5, U. S. Code, which provides that in the event of reductions being made in the force in any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped or be reduced in rank or salary.

While serving as a guard in the Bureau of Prisons at the U. S. Penitentiary at Lewisburg, Pennsylvania, plaintiff received on September 3, 1935, a formal written notice of suspension from the Warden of the institution. This notice was given by the Warden under and in pursuance of the provisions of Civil Service Commission Rule XII, promulgated by the Commission in conformity with section 652, Title 5, U. S. Code. The charge upon which plaintiff was suspended from his position as guard was based upon alleged misconduct by reason of his "having written letters to officials of the Government, criticizing the administration of prison affairs." Plaintiff promptly filed a sworn reply to the charge stating, in substance, that the letters mentioned in the notice of suspension were written by him

properly and in good faith and that the writing of such letters was not a violation of Civil Service Commission Rule XII. After receipt of plaintiff's reply to the formal written charge given him, upon the basis of which he was suspended, the suspension of plaintiff from his position in the Prison Service was continued and plaintiff was never permitted to resume his duties as a guard in the Prison Service, either at the U. S. Penitentiary at Lewisburg, Pennsylvania, or elsewhere. No formal hearing at which the plaintiff was present was had upon the written charge theretofore furnished him, but it is not alleged that plaintiff requested a hearing or that he was denied an opportunity to be heard before the proper official, or officials.

Plaintiff took no further steps in the matter until October 4, 1935, when he wrote a letter to the Director of the Bureau of Prisons expressing his regret of the mistake he had made in writing the letters criticizing the U. S. Prison administration. On October 8, 1935, he received a reply from the Assistant Director of the Bureau of Prisons which stated in part as follows:

> The Director has authorized me to say that he accepts your explanation of the transaction which resulted in your present suspension, and that in connection with your efforts to secure a transfer he is willing to give you the best letter of recommendation he could consistently issue. I am enclosing a draft of the letter of recommendation he would be willing to give you.
>
> If you will send us your application for leave without pay, we will arrange to terminate your suspension, with the understanding that while you will be officially a part of the Prison Service, you do not report back for duty at Lewisburg but retain the status of an employee on leave without pay pending your efforts to secure a transfer to some other branch of the service.

The "letter of recommendation," a draft of which was sent to plaintiff with the above-quoted letter of October 8, was subsequently signed by the Director of Prisons, and contained the following statement in regard to plaintiff:

> This employee was appointed at the U. S. Industrial Reformatory at Chillicothe, Ohio, March 1, 1928. Under date of August 7, 1929, he was transferred to

> the U. S. Penitentiary, Atlanta, Ga. From the latter institution he was transferred April 1, 1930, to the New Prison Camp opened near Fayettesville, N. C. He was then transferred to assist in opening the new camp near Petersburg, Virginia, May 4, 1930. He was promoted to the position of Lieutenant at Petersburg, Va., December 22, 1930, but at his request was transferred back to Fort Bragg, July 4, 1931, resuming the status of guard. When the Camp at Fort Bragg was discontinued he was transferred, December 12, 1933, to the new Northeastern Penitentiary near Lewisburg, Pa., in which institution he is now employed.
>
> During this period of employment he has rendered faithful, conscientious service. Reports from his superior officers show him to be a competent employee.

Plaintiff accepted the conditions set forth in the Director's letter of October 8, 1935, and on October 11, 1935, applied for leave without pay; upon receipt of plaintiff's letter the Director granted the application and on October 19, 1935, plaintiff received from the Director of the Bureau of Prisons, through the Assistant Director, a letter confirming the arrangement and enclosing a copy of a letter of October 17, 1935, from the Director to the Warden of the Lewisburg Penitentiary with respect to the termination of plaintiff's service at that institution and termination of his suspension on the conditions hereinbefore mentioned. The Director's letter to the Warden at Lewisburg contained, among others, the statement that "We consider that the discipline administered Mr. Baskin through the medium of suspension * * * is sufficient * * *."

Thereafter plaintiff made efforts to obtain a position in some other branch of the Government service to which he could be transferred under the arrangement hereinbefore stated, but without success. Thereafter, at some date not alleged, plaintiff sought reinstatement to his former position as a prison guard, but without success. Thereafter, at some time not alleged, the plaintiff consulted legal counsel, and his counsel made a request to the Director of Prisons for information. On January 15, 1936, plaintiff's counsel received a letter from the Director of the Bureau of Prisons in which the Director stated in part that plaintiff's "time

is up now, and his appointment is, therefore, being terminated for the good of the service."

In September 1937, about one year and eight months after receipt of the Director's letter of January 15, 1936, plaintiff, on advice of his counsel, instituted suit in the District Court of the United States for the Eastern District of South Carolina for salary as a Civil Service employee of the United States. April 6, 1940, the court dismissed the suit for lack of jurisdiction under subdivision 20 of section 41, Title 28, U. S. Code, which provides in part that nothing in that paragraph should be construed as giving the District Court jurisdiction of cases brought to recover fees, salaries, or compensation for official services of officers of the United States. Thereafter the plaintiff was advised by his counsel to bring suit in this court and, accordingly, the present suit was instituted August 1, 1941, about one year and four months later.

The salary of the position of guard at the Lewisburg Penitentiary which plaintiff was receiving up to the time his employment in the Prison Service was suspended September 3, 1935, and the rate of pay attaching to such position of guard since that time, has been and is $1,680 a year.

Between January 15, 1936, and August 1, 1941, the date of filing of the petition herein, plaintiff has earned and received $2,605 from private employment.

From the foregoing statement of facts, which are those set forth in the petition, we are of opinion that plaintiff has not stated a cause of action entitling him to recover salary as a prison guard. The facts show that plaintiff's employment in the Federal Service as a prison guard at Lewisburg, Pennsylvania, was first suspended September 3, 1935, and was completely terminated by the Warden and the Director of the Bureau of Prisons on October 17, 1935, upon the written charges made which, as far as that position was concerned, were never vacated or set aside and plaintiff was never restored to or advised that he would be restored to that position at the salary for which he here brings suit. That action of the proper Government officials was in accordance with the statute (sec. 562, U. S.

Code, *supra*) and the regulations of the Civil Service Commission, and is not subject to review here. *Burnap* v. *United States*, 252 U. S. 512, 518–520; *Norris* v. *United States*, 257 U. S. 77, 81, 82; *Medkirk* v. *United States*, 44 C. Cls. 469, 481; *Ruggles* v. *United States*, 45 C. Cls. 86, 89.

The subsequent arrangement between the Director of the Bureau of Prisons and plaintiff, which existed from about October 8, 1935, to January 15, 1936, to the effect that if plaintiff would make application for leave without pay his suspension from Government service, in order that he might make efforts to secure a transfer to some other position in the Government service, would be terminated with the understanding that, although plaintiff while on leave without pay would be officially a part of the Prison Service, he could not report back for duty at Lewisburg, Pennsylvania, but would be in the status of an employee on leave without pay pending his efforts to secure a transfer to some other branch of the Government service, did not in any way or at any time give plaintiff the right to demand the position of prison guard from which he had been removed, or the pay thereof. Plaintiff has no right by statute or otherwise to recover compensation from the Government because he was not given some other position in the Government service, and the termination for the good of the service of plaintiff's appointment while he was in the status of an employee on leave without pay, after he had been given an opportunity to obtain a position in some other branch of the Government service to which he could be transferred, was clearly not illegal. Moreover at the time plaintiff's appointment, while he was in the status of being merely an employee on leave without pay, was terminated for the good of the service on January 15, 1936, plaintiff was not holding any position in the Government service from which he was entitled to any compensation. In any event, we think plaintiff was guilty of laches after January 15, 1936, in asserting his claim. *Arant* v. *Lane*, 249 U. S. 367, 369–372. The fact that plaintiff was an honorably discharged soldier does not under the facts of this case affect the decision. *Keim* v. *United States*, 177 U. S. 290, 295, 296; *Medkirk* v. *United States*, *supra*.

The defendant's motion to dismiss is sustained and the petition is dismissed. It is so ordered.

Madden, *Judge;* Jones, *Judge;* Whitaker, *Judge;* and Whaley, *Chief Justice*, concur.

CALIFORNIA MILLING CORPORATION v. THE UNITED STATES

[No. 45064. Decided January 5, 1942]

On the Proofs

Government contract; nonpayment of processing tax.—Decided upon the authority of *United States* v. *Kansas Flour Mills*, 314 U. S. 212 (92 C. Cls. 390, reversed).

The Reporter's statement of the case:

Rhodes, Klepinger & Rhodes for the plaintiff.

Mr. Hubert L. Will, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. Messrs. *Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact, as follows, pursuant to the stipulation of the parties:

1. Plaintiff is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business in Los Angeles, California. Plaintiff is the sole owner of the claim sued upon and has never assigned the same or any part thereof, or any interest therein. At all times mentioned herein, plaintiff was engaged in the business of manufacturing flour and related products from wheat for sale to various buyers, including the United States.

2. On the 22nd day of October 1936, pursuant to an award made to it by the Veterans' Administration, plaintiff and defendant entered into a contract, numbered VAS–2457, under the terms of which plaintiff agreed to sell to the defendant, and the defendant agreed to purchase from the plaintiff four hundred (400) barrels of hard wheat flour and three hundred (300) barrels of soft wheat flour, for which

the defendant agreed to pay to plaintiff the sum of three thousand eighty dollars ($3,080.00). Plaintiff performed the contract and delivered the flour sold thereunder, and same was approved and accepted by defendant.

3. Thereafter a voucher (No. 27656) to cover the payment of this sum was issued by the Veterans' Administration and sent to the General Accounting Office for pre-audit before payment. Of the sum of $3,080.00, the sum of $522.80 was deducted and withheld by the Acting Comptroller General of the United States, who, on April 22, 1937, issued a Notice of Settlement of Claim [Certificate No. 0442731, Claim No. 0623872(2)], in which he certified that $3,080.00 was due the plaintiff under the contract but that, of that amount, the sum of $522.80 had been credited by him against an alleged indebtedness of that amount on account of certain alleged overpayments made by the defendant to the plaintiff under certain other contracts hereinafter mentioned.

4. Theretofore, on August 28, 1935, and September 19, 1935, the plaintiff and defendant had entered into contracts numbered VAS-1788 and VA9h-961, respectively, for the sale to the defendant of flour and other wheat products. There follows an excerpt from one of these contracts which is typical of the price provision contained in both of them and that contained in all of the invoices issued to the defendant by the plaintiff covering the two contracts:

> Prices set forth herein include any Federal tax heretofore imposed by the Congress which is applicable to the material purchased under this contract. If any sales tax, processing tax, adjustment charge, or other taxes or charges are imposed or changed by the Congress after the date set for the opening of the bid upon which this contract is based and made applicable directly upon the production, manufacture, or sale of the supplies covered by this contract, and are paid to the Government by the contractor on the articles or supplies herein contracted for, then the prices named in this contract will be increased or decreased accordingly, and any amount due the contractor as a result of such change will be charged to the Government and entered on vouchers (or invoices) as separate items.

Plaintiff made delivery of all flour and other wheat products provided for in these two contracts, same was accepted by

defendant, and defendant paid to plaintiff the bid or contract price therefor.

5. Plaintiff was the processor of the wheat from which the flour was manufactured; but as a result of action taken in courts of the United States, the Collector of Internal Revenue was enjoined from collecting from domestic processors of wheat any processing taxes, so that no processing tax was paid by the plaintiff on any of the wheat used in the manufacture of the flour delivered to the defendant under the contracts mentioned in Finding 4 above.

6. Prior to the execution of the contracts mentioned in Finding 4 above, the Secretary of Agriculture, in accordance with the authority vested in him by the provisions of the Agricultural Adjustment Act of May 12, 1933 (48 Stat. 31), as amended, had, by wheat Regulations approved by the President, established the rate of processing tax imposed on the first domestic processing of wheat and the conversion factor necessary to determine the processing tax imposed upon a particular product manufactured from wheat. Under such regulations the tax was fixed at 30 cents per bushel on all wheat processed, the conversion factor applicable to wheat flour was fixed at .00704 cents per pound, and the conversion factor applicable to graham flour and cracked wheat was fixed at .005 cents per pound.

7. The amount of the processing taxes which the defendant alleges were included in the contract price of the flour and other wheat products delivered to the defendant under the two contracts mentioned in Finding 4 above, is as follows:

Contract No. VAS-1788	$482.94
Contract No. VA9h-961	39.86
Total	$522.80

The court decided that the plaintiff was not entitled to recover.

Memorandum *per curiam:* Consideration of this case has been withheld for some time because an exactly similar case, that of UNITED STATES v. KANSAS FLOUR MILLS CORPORATION, has been pending in the Supreme Court. December 8, 1941,

the last named case was decided (314 U. S. 212), the Supreme Court holding contrary to the contentions made by the plaintiff in the case now before us. Following the ruling and holding of the Supreme Court judgment will be entered in the instant case dismissing the plaintiff's petition, and against it for the costs of printing the record as provided by law.

JOHN HAYS HAMMOND, JR., v. THE UNITED STATES

[Nos. 45330 and 45332. Decided January 5, 1942]

On Motion for Reconsideration

Patents for radio equipment; claims held not to be inconsistent.—Where on August 25, 1941, the defendant filed a motion in each case in suit asking "for an order requiring the plaintiff to elect between the two inconsistent claims for compensation allegedly resulting from one and the same act (the use of certain radio equipment) as set forth in the petition"; and where on September 6, 1941, an order was made by the court directing plaintiff "to elect whether he will prosecute his claim as a breach of contract, or under the jurisdictional patent act, and to amend his petition accordingly"; and where, thereupon, plaintiff filed a motion asking the court to reconsider and vacate said order; and where the plaintiff later in open court amended his petition so as to state his claim in the alternative, for compensation under section 68, Title 35, or section 250, Title 28, U. S. C. A., rather than under both said sections of the Code, as the petitions were originally drawn; it is *held* that, aside from the possible difference in character or degree of the proof required (as to which the court expresses no opinion), the claims are not found to be inconsistent in the sense that plaintiff is required to elect whether he will claim compensation for unauthorized use without license or consent under the Act of 1910, as amended, or for compensation for unauthorized use without license or consent contrary to the written agreement between the parties.

Mr. Raymond M. Beebe for plaintiff. *Mr. Nathaniel L. Leek* and *Messrs. Davies, Richberg, Busick & Richardson* were on the brief.

Mr. Paul P. Stoutenburgh, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The facts sufficiently appear from the opinion of the court.

LITTLETON, *Judge*, delivered the opinion of the court:

The petition in case No. 45330 filed January 11, 1941, involves five U. S. patents and case No. 45332 filed January 21, 1941, involves eleven other U. S. patents, all relating to certain radio equipment. The petitions in both cases as they now stand ask judgment against the United States (1) under the Act of June 25, 1910, as amended by the Act of July 1, 1918, Tit. 35, U. S. C. A., section 68, for reasonable and entire compensation for infringement through the manufacture and/or use by the United States of the patented inventions described in the petitions without right, license, or authority of the owner thereof; or (2) under section 250, U. S. C. A., Tit. 28, "as compensation for the unlawful and unauthorized use of the inventions in disregard of the provisions of said contract." Each petition separately and succinctly sets forth allegations of fact as to the right to compensation under Tit. 35, U. S. C. A., section 68, by reason of manufacture and use by the defendant without the consent of the patentee, or a license so to do (infringement), or for compensation under section 250, Tit. 28, U. S. C. A., for unauthorized manufacture and use by reason of failure of defendant to comply with a contract with plaintiff under which a license for a limited use of certain patents was granted.

Paragraphs 1 to 5, inclusive, of the petitions set forth the necessary preliminary facts.

Paragraphs 6 to 10, inclusive, set forth (1) that the defendant had theretofore been granted a license under certain of the patents for the manufacture and use of the inventions for the purpose of radio dynamic control only and not for purely radio communication purposes or any other purpose than radio dynamic control; (2) that the defendant had been granted a release from any and all liability arising out of or based upon the furnishing to it by another for such limited use of any apparatus covered by the license; (3) that the defendant has infringed the claims of the patents without the license or consent of plaintiff by the manufacture by the defendant and/or by the use

by it for communication purposes and for purposes other than radio dynamic control of radio equipment as provided in the license given, and that the defendant had been duly notified prior to and during the period of six years prior to filing of the petition of its infringement of the patents, but that notwithstanding such notices the defendant has continued to infringe the patents to the injury of plaintiff by reason of loss of gains and profits which he, otherwise, would have received.

In paragraphs 11 to 14, inclusive, the petitions proceed to allege (1) that pursuant to an agreement of July 30, 1932, between plaintiff and defendant, the parties on April 22, 1933, entered into a license contract for the use by defendant of the inventions covered by certain patents for the purpose of radio dynamic control only and the defendant expressly agreed not to use the inventions set forth in the patents described for purely communication purposes or for any other purpose, except for radio dynamic control; (2) that the plaintiff has in every respect fully and completely performed the contract; (3) that the defendant on its part has failed to perform the contract and has violated the same by using and/or manufacturing, or having manufactured for it, radio equipment embodying the inventions set forth and claimed in the patents for communication purposes and for purposes other than radio dynamic control to the great damage of plaintiff; and (4) that the defendant had been duly notified prior to and during the past six years of its violations of said contract, but that, notwithstanding such notices, the defendant has continued to violate said contract by using and/or manufacturing, or having manufactured for it, radio equipment embodying the inventions set forth and claimed in the patents for communication purposes and for purposes other than radio dynamic control to the great injury to plaintiff by reason of loss of gains and profits which he otherwise would have received.

August 25, 1941, the defendant filed a motion in each case asking "for an order requiring the plaintiff to elect between the two inconsistent claims for compensation al-

legedly resulting from one and the same act [the use of certain radio equipment] as set forth in the petition." September 6, 1941, an order was made directing plaintiff "to elect whether he will prosecute his claim as a breach of contract, or under the jurisdictional patent act, and to amend his petition accordingly within thirty days" from date of the order. Thereupon plaintiff filed a motion asking the court to reconsider and vacate its order, as abovementioned. The case is now before the court on plaintiff's motion, upon which oral argument was had. Since the making of the original order the plaintiff in open court amended his petitions so as to state his claim in the alternative; i. e. for compensation under section 68, Tit. 35, U. S. C. A., or section 250, Tit. 28, U. S. C. A., rather than under both sections of the Code as the petitions were originally drawn.

Aside from the possible difference in character or degree of the proof required (about which we now express no opinion) under the alternative claims under the facts set forth in the petitions, we do not find the claims to be inconsistent in the sense that plaintiff is required to elect whether he will claim compensation for unauthorized use without license or consent under the act of 1910 as amended by the act of 1918, or for compensation for unauthorized use without license or consent contrary to the written agreement between the parties. If plaintiff were claiming in the same suit compensation for use of the inventions under and pursuant to a contract or license, and therefore with the consent of plaintiff, or for infringement of the inventions without the consent or license of plaintiff, the claims would be inconsistent and plaintiff would, in such case, be required to elect which remedy he would pursue, and if he recovered on the one chosen he could not later also recover on another. *May* v. *Le Claire*, 11 Wall. 217; *United States* v. *Oregon Lumber Co., et al.*, 260 U. S. 290; *Kendall* v. *Stokes*, 3 How. 87; *Dahn* v. *Davis*, 258 U. S. 421. But if plaintiff lost on the one chosen, because it was found not to exist, he would not, in such a case, be barred from pursuing the other remedy if not barred by limitation. *Ash Sheep Co.* v.

United States, 252 U. S. 159; *Bierce, Limited*, v. *Hutchins*, 205 U. S. 340. In the present suits the alternative claims are based upon alleged unauthorized use by the defendant of the patents without the consent or license of plaintiff, and plaintiff claims compensation only for that alleged unauthorized use. If the written contract between the parties and the written nonexclusive license of plaintiff to the Government thereunder for the use of the patents had stated that the nonexclusive rights were granted "for radio dynamic uses only" and nothing further was said in the agreement or license, any other use or uses of the inventions by the defendant would certainly be unauthorized and would constitute an infringement of the patents for which, upon proper proof, plaintiff would be entitled to compensation. What effect the further provision in the contract and license, i. e. "but no use of the patents and/or inventions of Schedule II for purely radio communication purposes is authorized," had upon the rights of plaintiff or the degree or character of proof necessary to sustain the claim, we do not now decide. But we think it is clear that since the alternative claims here made are based upon unauthorized use of the inventions they are not inconsistent merely because plaintiff, as one ground for recovery of compensation, alleges that the defendant expressly agreed not to use the inventions for the purpose for which it is alleged it did use them and, as another ground for compensation, that the defendant so used the inventions for the same purposes without authority and without consent or license of plaintiff. One recovery only is claimed and only one can be allowed. We have considered the cases relied upon by the defendant but find it unnecessary to discuss them because they are not, upon their facts and circumstances, applicable here.

The petitions might have been drawn so as specifically to separate each petition into two designated counts: the first count being paragraphs 6 to 10, inclusive, and the second, an alternative count, being paragraphs 11 to 14, inclusive. But failure to frame the petitions in this form does not affect the question now being considered. Each petition in substance is in two counts, which for the sake of brevity may

be termed respectively the "patent count" and the "contract count." In order to avoid confusion in the taking of proof and the presentation of these alternative claims the commissioner to whom these cases are referred for the purpose of taking the evidence and making a report of the facts is hereby authorized and directed to control the manner and sequence in which the evidence shall be presented. Such control of the procedure is essential in order that, so far as may be necessary, the facts relating specifically to the one count should not be confused with facts relating solely to the other count. Also, the parties, the commissioner, and the court are entitled to know to which count certain evidence pertains in order that the opposing party may properly present objections. The facts with reference to the alternative claims asserted are separately and distinctly set forth, and the necessary preliminary allegations contained in paragraphs 1 to 5, inclusive, and the formal allegations in paragraphs 15 to 19, inclusive, of each petition are applicable to both claims. Had the plaintiff filed separate suits, as he might have done, the defendant certainly could not object to either. *Troxell, Administratrix* v. *Delaware, Lackawanna & Western Railroad Co.*, 227 U. S. 434; *Ash Sheep Co.* v. *United States, supra; Lovejoy* v. *Murray*, 3 Wall. 1; *Brady* v. *Daly*, 175 U. S. 148. Had that course been pursued the separate suits could and probably would have been consolidated for hearing and decision since both claims would involve the right to compensation for unauthorized use without the consent or license of the patentee. But separate suits are not necessary in the circumstances. This is the only court having jurisdiction of the claim for compensation asserted by plaintiff and the court is not bound by the strict rules of pleading. *Peirce* v. *United States*, 1 C. Cls. 195, 196; *Brown* v. *District of Columbia*, 17 C. Cls. 303, 310; *Eager* v. *United States*, 33 C. Cls. 336, 337; *United States* v. *Burns*, 12 Wall. 246, 254; *United States* v. *Behan*, 110 U. S. 338, 347. In the latter case the court said:

> In a proceeding like the present, in which the claimant set forth, by way of petition a plain statement of facts without technical formality, and prays relief

> either in a general manner, or in an alternative or cumulative form, the court ought not to hold the claimant to strict technical rules of pleading, but should give to his statement a liberal interpretation, and afford him such relief as he may show himself substantially entitled to if within the fair scope of the claim as exhibited by the facts set forth in the petition.

To the same effect are *Baird* v. *United States*, 131 U. S. Appx. civ, cvii; *District of Columbia* v. *Talty*, 182 U. S. 510, 513; *District of Columbia* v. *Barnes*, 197 U. S. 146, 154. In *Clark* v. *United States*, 95 U. S. 539, the court said at p. 543:

> If objected that the petition contains no count upon an implied contract for *quantum meruit*, it may be answered, that the forms of pleading in the Court of Claims are not of so strict a character as to preclude the plaintiff from recovering what is justly due to him upon the facts stated in his petition, although due in a different aspect from that in which his demand is conceived.

See, also, *Minar* v. *Sheehy*, 13 Fed. (2d) 290; *Twachtman* v. *Connelly*, 106 Fed. (2d) 501.

Plaintiff's motion of September 29, 1941, for reconsideration of the order of September 6, 1941, is allowed. The order of September 6 directing plaintiff to elect is vacated and set aside and the defendant's motion of August 25, 1941, for an order requiring plaintiff to elect between alleged inconsistent claims for compensation is denied. This decision of the court does not affect the order of the court of February 15, 1941, allowing defendant's motion of February 7, 1941, to which plaintiff consented, for an order requiring plaintiff to make the petitions more definite and certain in certain particulars.

MADDEN, *Judge;* JONES, *Judge;* WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

ALABAMA COTTON COOPERATIVE ASSOCIATION AS SUCCESSOR TO ALABAMA FARM BUREAU COTTON ASSOCIATION, A CORPORATION, v. THE UNITED STATES

Congressional No. 17750

CALIFORNIA COTTON COOPERATIVE ASSOCIATION, LTD., A CORPORATION, v. THE UNITED STATES

Congressional No. 17751

GEORGIA COTTON GROWERS COOPERATIVE ASSOCIATION, A CORPORATION, v. THE UNITED STATES

Congressional No. 17752

LOUISIANA COTTON COOPERATIVE ASSOCIATION, A CORPORATION, v. THE UNITED STATES

Congressional No. 17753

MID-SOUTH COTTON GROWERS ASSOCIATION, A CORPORATION, v. THE UNITED STATES

Congressional No. 17754

MISSISSIPPI COOPERATIVE COTTON ASSOCIATION, A. A. L., A CORPORATION, v THE UNITED STATES

Congressional No. 17755

NORTH CAROLINA COTTON GROWERS COOPERATIVE ASSOCIATION, A CORPORATION, v. THE UNITED STATES

Congressional No. 17756

OKLAHOMA COTTON GROWERS ASSOCIATION, A CORPORATION, v. THE UNITED STATES

Congressional No. 17757

SOUTH CAROLINA COTTON COOPERATIVE ASSOCIATION v. THE UNITED STATES

Congressional No. 17758

TEXAS COTTON COOPERATIVE ASSOCIATION, A CORPORATION, v. THE UNITED STATES

Congressional No. 17760

REPORT TO THE SENATE

[Filed January 20, 1942]

Federal Farm Board Operations; responsibility for losses sustained by cooperative marketing associations in connection with stabilizing operations in cotton; cases dismissed on motion of plaintiffs.—Report to the Senate with respect to dismissal of cases brought under the provisions of Senate Resolution 257, 76th Congress, third session (page 4405, Congressional Record) referring to the Court Senate bill No. 2585.

The facts sufficiently appear from the report to the Senate, as follows:

To the SENATE OF THE UNITED STATES:

Under date of April 15, 1940, your honorable body, acting through its secretary, Hon. Edwin A. Halsey, transmitted to the Court of Claims of the United States a resolution reading as follows:

S. RES. 257

IN THE SENATE OF THE UNITED STATES,
April 12 (legislative day, April 8), 1940.

Resolved, That the bill (S. 2585) entitled "A bill to reimburse the cotton cooperative associations for losses occasioned by the Federal Farm Board's stabilization operations, and for other purposes", now pending in the Senate, together with all the accompanying papers, be, and the same is hereby, referred to the Court of Claims, in pursuance of the provisions of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary", approved March 3, 1911; and the said court shall proceed with the same in accordance with the

provisions of such Act and report to the Senate in accordance therewith.

Attest:

EDWIN A. HALSEY,
Secretary.

The above-named petitioners filed identical petitions in this court in due form on October 10, 1940, alleging in appropriate language an obligation of the United States to reimburse them for losses necessarily incurred because of the stabilization operations during 1929–1930 of the Federal Farm Board, an established agency of the United States.

The defendant filed a general traverse and asked that the petitions be dismissed.

A commissioner of this court was duly assigned, authorized, and directed to take such testimony as might be offered by the petitioners and the defendant upon the issues raised in the several cases.

The commissioner commenced the hearing of testimony at New Orleans, Louisiana, on November 17, 1941, Hon. Wm. J. Holloway of Oklahoma, and Hon. Crampton Harris of Alabama, appearing for the petitioners, and G. C. Sherrod, Esq., and Newell A. Clapp, Esq., for the defendant. The taking of testimony proceeded on the 17th, 18th, and 19th of November, and comprised, to this point, a general background of the cotton business relating to the various cotton associations, the formation of the American Cotton Cooperative Association, the Cotton Stabilization Corporation, The Farm Credit Administration, and their relationship with each other.

On the morning of November 20, 1941, when the commissioner opened the hearing for the purpose of proceeding, plaintiffs' counsel made a motion for an adjournment of the hearing, basing his motion on the fact that he had just received a copy of the veto message of the President of the United States, which had been filed with respect to *South Dakota Wheat Growers Association* v. *The United States*, 90 C. Cls. 222, which was a case referred by the Congress to the Court of Claims, and which embraced substantially the same issues with regard to wheat as the present cases embrace in regard to cotton. (The veto message will be found in the Congressional Record of October 23, 1941.)

Plaintiffs' counsel stated that, as a result of the Wheat Growers Association case, the Congress of the United States had appropriated money by Joint Resolution to carry out the implied effect of the Court of Claims decision in that case. Plaintiffs' counsel further stated that, if at the end of the present cases the result should be an appropriation by the Congress for the benefit of the cotton associations, and if the Chief Executive should veto the measure, then, as a practical matter, it was a serious question whether time was being wasted in continuing the hearing of the present cotton cases, which would occupy several weeks of taking testimony, with attendant expense of bringing witnesses from many states. Counsel for plaintiffs read the veto message of the President and moved for an adjournment of the hearing in order to consider and advise what course should best be followed in this situation.

Counsel for the Government objected to the adjournment of the hearing, stating that the Government had gone to great expense in preparing the defense in the present cases, that they were prepared to try the cases, and desired to proceed.

After hearing full argument of counsel for plaintiff and defendant, the commissioner granted an adjournment of the hearing for two weeks, based on the statement of counsel for plaintiffs to the effect that, as at present advised, it would seem that their best course would be to discontinue the cases and dismiss them. If, however, they should decide not to do so, the hearings were to be resumed at the end of the two-week period.

Under date of December 6, 1941, counsel for the plaintiffs made motions before the Court of Claims to dismiss the cases, that motion reading in each case as follows:

MOTION TO DISMISS

To the Honorable Chief Justice and Associate Judges of the Court of Claims of the United States:

Now comes the plaintiff in the above styled cause and respectfully shows unto this Honorable Court the following facts:

1. The Federal Farm Board in 1929 and 1930 undertook stabilization operations in grain and cotton. In its operations it utilized cooperative marketing associations composed of wheat growers in the wheat belt and cotton growers in the cotton belt. The cooperative associations incurred carrying charges and overhead expenses in the stabilization program.

2. On January 8, 1940, this Court handed down an opinion in Case No. 43528, *South Dakota Wheat Growers Association, Inc.* vs. *the United States*. Thereafter, the House and Senate of the United States passed Senate Joint Resolution 29, "for the relief of the South Dakota Wheat Growers Association, Inc."

On October 23, 1941, the aforesaid joint resolution was returned to the Senate with an accompanying veto message in which the following language appears:

"The stabilization program was carried on at great expense to the Government, was conducted primarily in the interests of the wheat growers, including the claimant and its members, in the hope of enabling them to market their products at higher prices; and they held the wheat off the market at the request of the Board as copartner in a program voluntarily undertaken in their own behalf. As participants in this program, it was necessary for the cooperatives to incur obligations for storage and carrying charges; and there appears to be no satisfactory justification for the Government's assuming these charges in addition to the substantial losses and expenses which it incurred in taking over the wheat at a time when the market price had declined below the loan price."

3. At the time plaintiff filed its claim in this Court plaintiff and its counsel were firmly convinced of the fundamental justice and merit of the plaintiff's claim. That conviction is today as strong as ever.

If this Court should, after full hearing, be of the same view as plaintiff and its counsel, it would still be necessary for the Congress of the United States to pass a joint resolution or an act appropriating money for the relief of the plaintiff, which resolution or act would necessarily go to the President of the United States for his approval or disapproval.

In view of the similarity between the claim for storage and carrying charges on wheat and plaintiff's claim for carrying charges and overhead expenses on cotton,

and in view of the stress of the present national situation, it is very much to be doubted whether such joint resolution or act would receive the approval of the Chief Executive.

In the light of the facts above stated it now appears to plaintiff and its counsel that it would be inadvisable to continue further with the presentation of evidence in this Court.

WHEREFORE, THE PREMISES CONSIDERED, plaintiff does herewith pray that it be allowed to dismiss its claim and that an order of dismissal be entered herein.

The defendant's response to plaintiffs' motions is as follows:

RESPONSE OF DEFENDANT TO PLAINTIFF'S MOTION TO DISMISS

(Filed Dec. 16, 1941)

Comes now the defendant, by its Assistant Attorney General, and in response to plaintiff's motion to dismiss states:

1. The motion to dismiss leaves unclear whether plaintiff is wholly abandoning its claim or merely abandoning its claim for the present with the intention of renewing the same before Congress or this Court at what is deemed a more opportune time. The statements of plaintiff's counsel at the hearing in New Orleans and the language of the motion strongly indicate that the claim is not being permanently abandoned.

2. The defendant, of course, has no objection to allowance of the motion if plaintiff gives definite assurance that a dismissal means permanent abandonment of the claim. In such event an investigation and determination of the facts would serve no useful purpose.

3. An entirely different situation is presented if the motion to dismiss is based upon present expediency, with the intention of renewing the same before the Congress or this Court at a time deemed more propitious. The allowance of a motion so predicated would be contrary to the express wishes of the Senate, prejudicial to the rights of defendant, and against sound public policy.

4. The instant case is one of thirteen cases referred to this Court by the Senate on April 12, 1940, to investigate and determine the facts and report them to the Senate,

in accordance with section 151 of the Judicial Code.[1] The claims presented in the thirteen cases total in excess of four and one-quarter millions of dollars and involve substantially the same facts relating to the activities of the Federal Farm Board during the cotton season of 1929–1930. The claims have been actively prosecuted by the claimants before the Federal Farm Board and the Congress since 1930. The costs to the Government with respect thereto have been very substantial. By the reference of the cases to this Court, the Senate has clearly indicated its desire that the facts be determined finally and that each claimant be placed "in such a position upon the record that he will be morally, if not legally, concluded from again troubling Congress."[2] In deference to the wishes of the Senate, the facts should be investigated, determined, and reported unless the claimants are ready to give definite assurance that the claims are being permanently abandoned.

5. Following the reference by the Senate and the filing of petitions in the cases, the Government made a thorough investigation at a cost to it of thousands of dollars. On November 17, 1941, hearings were commenced before a Commissioner at New Orleans, Louisiana. These hearings continued until November 20, 1941, at which time they were adjourned at the request of the plaintiffs and over the objection of defendant. These hearings involved additional expense to defendant and the Court. If the claims are renewed at a future date, defendant would be forced to reinvestigate the facts and reprepare them for presentation. There is serious doubt, particularly in view of the factor of age, whether important witnesses on behalf of defendant would be available to testify. Important books, records, and other documents may become lost or destroyed. It is to be noted, in this regard, that the claimants in prosecuting their claims before Congress, presented special reports or audits based on certain theoretical formulas to show the amount of money each had spent during the cotton season of 1929–

[1] The cases so referred are identified in this court as Congressional Cases, Nos. 17750–17762, both inclusive. On October 10, 1940, the claimant in the case at bar, along with the claimants in ten of the others, filed its petition in this court alleging the facts upon which it based its claim. The Texas Cotton Growers Association (Cong. No. 17759) informed this Court in its petition that for the reasons therein stated it would not file any claim. Its petition was thereupon dismissed. In the two cases numbered Cong. 17761 and 17762, wherein Southwestern Irrigated Cotton Growers Association and Staple Cotton Cooperative Association are the respective claimants, no petitions have been filed.

[2] See *Burdette* v. *The United States*, 15 C. Cls. 465, 468.

1930 for carrying charges on cotton and for overhead, and for which they were and are asking reimbursement. These special reports, which are now in file in this Court, were used because, it was asserted, the books and records of the various claimants were not available. (See special reports.) During the course of the hearing at New Orleans two of plaintiffs' witnesses testified that the records of Texas Cotton Cooperative Association and South Carolina Cotton Cooperative Association, two of the claimants in these cases, were in existence (Tr. 193–212, 279). The records of some or all of the other claimants may also be in existence. The danger of loss or destruction of such important records is a matter which merits careful consideration.

6. The power of this Court to overrule the motion to dismiss is beyond question. It is well established that a court may in the exercise of a sound discretion deny a motion to dismiss if the rights of defendant may be prejudiced thereby. *Pullman Palace Car Company* v. *Central Transportation Company*, 171 U. S. 138, 146; *Greenville Banking & Trust Co.* v. *Selcow*, 25 F. (2d) 78, 80; *Young* v. *Southern Pacific Co.*, 25 F. (2d) 630. There is here the additional consideration that the Senate has expressly indicated its wishes in the matter.

CONCLUSION

The Court should require plaintiff clearly to state whether its claim is being permanently abandoned. If assurance to such effect is given, the motion to dismiss should be allowed and a report made to the Senate relative to the ground of the dismissal. Absent such assurance, the motion to dismiss should be overruled.

Respectfully submitted.

FRANCIS M. SHEA,
Assistant Attorney General.

GROVER C. SHERROD,
NEWELL A. CLAPP,
Attorneys for defendant.

The bill pending in the Senate contemplates reimbursement of the cotton cooperatives for alleged losses, which involve no legal or equitable claim against the Government, but a gratuity or bounty, and, by their voluntary motions to dismiss, claimants declare their intention to withdraw all claim to action on the bill by the Senate. In view of this situa-

tion, and in order to obviate the excessively heavy expense to which both parties would be subjected in bringing their witnesses from various states for the purpose of testifying, the Court, in the exercise of its sound discretion (171 U. S. 138, 146), unanimously granted petitioners' motions and ordered the cases dismissed on January 5, 1942.

By order of the Court the foregoing report is certified to the United States Senate.

RICHARD S. WHALEY,
Chief Justice.

LITTLETON, *Judge*, is of opinion that before making a report to the Senate the court should allow the Government to proceed and submit such evidence as it may have with reference to the subject-matter of Senate Bill 2585.

GREAT LAKES CONSTRUCTION COMPANY v. UNITED STATES

[No. 43512. Decided February 2, 1942]

On the Proofs

Government contract; incomplete plans.—Where plaintiff, a contractor, entered into a contract with the Government for the construction of a Federal penitentiary near Lewisburg, Pa.; and where the preparation of plans and specifications was hastily done; and where after the contract was made blueprints were supplied to plaintiff with additions and corrections made by blue pencil and no revised blueprint containing all the insertions was ever given to plaintiff; it is *held* that there is no proof that the condition of the plans caused misunderstanding, confusion, or delay and plaintiff is accordingly not entitled to recover.

Same; changes in plans covered by supplemental agreements.—Where during the progress of the work on the Federal penitentiary being constructed near Lewisburg, Pa., the Government made frequent changes in the plans, in addition to insertions and corrections on the blueprints and where the contract expressly permitted the Government to make such changes with proper compensation to the contractor, and where in connection with each such change a supplemental contract was entered into by the parties; it is *held* that the said supplemental agreement left no further unliquidated claim by which the plaintiff can recover for overhead, profit, or delay.

Same; indefiniteness of damages; substantial proof.—Where a plaintiff has been legally wronged, indefiniteness of proof as to the exact amount of damages will not prevent a recovery (*Mansfield & Sons Co.* v. *United States*, 94 C. Cls. 397) but there must be tangible evidence of substantial damage.

The Reporter's statement of the case:

Mr. T. I. McKnight for the plaintiff. *Sims, Handy, McKnight & Carey* were of counsel.

Mr. Carl Eardley, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. J. Robert Anderson* was on the brief.

The court made special findings of fact as follows:

1. Great Lakes Construction Company, plaintiff, is a corporation organized under the laws of the State of Illinois, with its headquarters in the City of Chicago, Illinois. It has done a general contracting business since 1920.

2. Pursuant to the provisions of an act of Congress, approved May 27, 1930, (46 Stat. 388) the Attorney General of the United States was empowered to select and procure a site to serve the northeastern section of the United States, as a penitentiary for the confinement of male persons convicted of offenses against the United States. The site selected was near Lewisburg, Union County, Pennsylvania.

The Secretary of the Treasury, on request of the Attorney General, contracted for the furnishing of plans, specifications and estimates for the construction of the buildings to be erected on the site so selected. Congress made appropriations for the purchase of the site, and for the construction and equipment of the buildings thereon. The money so appropriated was to be expended under the direction and upon the written order of the Attorney General.

3. On July 26, 1930, the Secretary of the Treasury entered into a contract with Alfred Hopkins, an experienced architect of New York City, for preliminary sketches and specifications, sufficient for an estimate of the cost of the penitentiary. On November 14, 1930, the Secretary of the Treasury and Alfred Hopkins entered into a contract, by the terms of which Hopkins was employed as architect for the planning and construction of the building.

4. There was an understanding between the Department of Justice and the Treasury Department to the effect that the Attorney General would sign the contract for the construction of the penitentiary, and that the Treasury Department would contract for the necessary architectural services. It was understood that Architect Hopkins would supervise and superintend the construction; that the Treasury Department would have periodical inspections and final inspection made by engineers of the Office of the Supervising Architect in the Treasury Department, and that technical advice would be rendered by that office. It was further understood that if during the progress of the work modifications of the then existing contracts were desired, proposals for such changes would be obtained by Architect Hopkins for action by the Department of Justice.

5. On November 29, 1930, the Office of the Supervising Architect of the Treasury Department sent to all prospective bidders, including plaintiff, 67 blueprint general plans and 36 blueprint mechanical drawings which were accompanied by the specifications, and invited proposals for the performance of the work required. The blueprints were made from the architect's original tracings, on file in the Office of the Supervising Architect.

On January 19, 1931, plaintiff submitted its bid for the construction of the penitentiary, based on the plans and specifications furnished by the Office of the Supervising Architect, for the sum of $2,781,800.00. The bids were opened and plaintiff's proposal was found to be the low bid.

On January 31, 1931, plaintiff and the United States, represented by the Attorney General, entered into a contract for the construction of the Federal Penitentiary at Lewisburg, Pa. Plaintiff agreed to furnish all labor and materials, perform all work required for the construction of the penitentiary, including an enclosure wall and all grading and drainage within the wall, and a 10-foot level area on the outside of the wall, in accordance with the specifications, schedules, and drawings, together with the addendum specifications Nos. 2, 3, and 4, dated, respectively, December 22, 1930, and January 6 and 8, 1931. The contract and specifications and addendum specifications Nos. 2, 3, and 4 are

of record as plaintiff's exhibits 1 and 2 and are by reference made a part of this finding.

6. The contract provided that work be commenced as soon as practicable after the receipt of notice to proceed, which notice was given plaintiff on February 14, 1931, and the contract was to be completed within 425 calendar days thereafter, which fixed the date for the completion on or prior to April 14, 1932.

The penitentiary, as designed by Architect Hopkins, was of highly ornamental construction, based on a building in Italy of the Renaissance period, showing fingerprints on the moulded brick, containing bulging or wavy walls, sagging rafters like a Chinese pagoda, a large sculptured group of angels 10 ft. wide and 14 ft. high weighing 14 tons, various fountains, well-heads, state seals for the 48 States of the United States, and originally provided for many different shapes of bricks.

7. Plaintiff's claims for recovery fall into the following classes:

a. Balance due on the contract price; not contested by the defendant.

b. Extras ordered but not paid for; not contested by the defendant.

c. Extras ordered but not paid for; contested by the defendant.

d. Damages due to defendant's interference and delay; contested by the defendant.

The items in plaintiff's petition, as modified by statements in its briefs, may be rearranged as follows:

1. Items not contested by the defendant:

Item	Amount
1. Balance due on contract	$1, 277. 99
2. Supp. 70 (70A)	47. 72
3. Supp. 44	20, 198. 53
4. Correction in screens	121. 12
5. Connecting kitchen equipment	1, 801. 69
6. Enclosure wall extras	12, 773. 77
7. Extra terra cotta copings	9, 527. 76
8. Extra cinders	3, 827. 47
9. Added hospital equipment	387. 20
10. Added stack work	450. 00
	50, 413. 25

2. Claims disputed by the defendant:

1. Temporary heat and winter protection	$5, 860. 17
2. Moulded brick in entrance building	610. 00
3. Emergency surcharge on freight	3, 208. 58
4. Extra bulk excavation	5, 855. 00
5. Additional sidewalks	704. 83
6. Increased costs due to defendant's interference and delay	285, 249. 59
	301, 488. 17

8. The Attorney General of the United States signed the contract on behalf of the United States and also was the "head of the Department," as defined in Article 18 (a) of the contract. Mr. Sanford Bates, then Director of the Bureau of Prisons of the Department of Justice, was the authorized representative of the contracting officer, as provided for in Article 18 (b); during the absence of Mr. Bates, either Mr. W. T. Hammack or Mr. James V. Bennett, both Assistant Directors of the Bureau of Prisons, served as the contracting officer's authorized representative; the general conditions of the specifications, paragraph 10, state that the architects mentioned are "Alfred Hopkins and Associates, 415 Lexington Avenue, New York City."

The contract between the architect and the Treasury Department provided for the superintendence of the work by a competent engineer or engineers, constantly on the job. Thomas C. Peterson was employed by the architect as such engineer, and he superintended the work at the site. Mr. Peterson made daily progress reports, and assisted in preparing monthly progress reports as a basis for making monthly payments to the plaintiff. Article 8 of plaintiff's contract provided for the superintendence of the work at the site by a competent representative of plaintiff, authorized to act for him. Walter Landin was employed by plaintiff as such superintendent, and remained on the work throughout the contract, made daily and weekly reports, and assisted in preparing monthly reports. He was not called as a witness by plaintiff. Mr. Peterson, the architect's superintendent, and Mr. Landin, plaintiff's superintendent, worked in harmony during the course of the work, and cooperated in expediting construction.

9. Article 3 of the contract reads as follows:

> *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties can not agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

Many changes were made in the drawings, plans, and specifications during the performance of the work. Such changes were accomplished by means of supplemental contracts in writing, with three exceptions. These supplemental contracts were effected in the form of invitations from the architect to the plaintiff describing the changes desired, together with the necessary revised plans and specifications; plaintiff then submitted proposals in writing, offering to perform the changed work at a certain price, and such proposals were then accepted in writing by the contracting officer's representative. The three exceptions to this procedure involved changes in the kitchen and outside sewer lines, and are included in proposed supplemental contracts Nos. 52, 70, and 70A. In these three instances the parties could not agree, at the time, as to the compensation plaintiff should receive for such additional work. However, in each of the three instances the contracting officer issued to plaintiff an order to proceed to make the change subject to a later determination as to the amount of increased compensation, which amounts were later deter-

mined by the contracting officer, and accepted by plaintiff, with neither protest nor appeal.

During the progress of the work, 109 changes were made, 29 of which were agreed upon as requiring no change in the contract price. Thirty (30) of the remaining changes agreed upon changed the contract compensation by an amount not greater than $200. Only six, of the total of 109 such changes, involved sums in excess of $10,000. Under the provisions of these supplemental contracts requiring additional work, the total of increased compensation to plaintiff amounted to $195,134.57. This sum included 10% overhead, and 10% profit, allowed plaintiff in all cases in arriving at the increased compensation under the supplemental contracts. Deductions from the contract price amounted to $37,535.60.

10. In most instances the changes made in the contract were agreed upon in writing long enough in advance so as not to delay plaintiff in the progress of its work. Disputes frequently arose as to the amount of increased or decreased compensation to be allowed. When these disputes could not be settled by agreement, they were referred to the office of the supervising architect of the Treasury Department, who then recommended the amount or basis of increase or decrease of the contract price, which recommendation was inserted in a supplemental agreement. It is not proved that these disputes materially delayed the progress of the work.

11. Some of the supplemental contracts (finding 9, *supra*) provided for extensions of contract time, either agreed upon at the time or later determined by the contracting officer. The extensions so granted totalled 219 days, thus extending the completion date from April 14, 1932, to November 19, 1932. On October 27, 1932, plaintiff requested that final inspection be had on November 7, 1932, on which date an engineer from the Office of the Supervising Architect began final inspection which was completed on November 9, 1932. Defendant's inspector recommended that November 7, 1932, be considered as the date of final completion of the contract. This recommendation was adopted. Plaintiff completed the work twelve days prior to the extended completion date.

The defendant's architect, on two occasions, requested plaintiff not to proceed with certain work pertaining to the enclosure wall and the factory building, due to proposed changes in their construction. Plaintiff was not prevented, however, from working on other parts of the project not affected by the proposed changes. It is not proved what damages, if any, resulted from these two incidents.

12. On January 23, 1936, plaintiff submitted a claim for final settlement to the Comptroller General. The Comptroller General requested the Department of Justice to make an examination of plaintiff's statement of account and submit an administrative report and recommendation. A report was prepared by the contracting officer's duly authorized representative and submitted to the Comptroller General November 30, 1936.

The claims discussed in findings 13 to 19, inclusive, were rejected as being unsupported by facts showing that they "were an integral part of the contract," and therefore "not considered as susceptible of administrative interpretation." The claims covered by findings 21 to 25, inclusive, for extras were also recommended for rejection.

Claim for delay because of changes and errors in dimensions

13. The contract plans for the penitentiary were completed under pressure to get the work started as soon as possible. For this reason the plans were not as thoroughly checked as is customary before release to bidders, and, as included in plaintiff's contract, the plans contained many minor discrepancies and errors. On February 21, 1931, the architect sent plaintiff a set of blueprints with some seven hundred insertions made in colored pencil. After a conference between the parties in April, 1931, a set of plans with further additions was prepared for plaintiff. Plaintiff insisted that it ought to be furnished clean revised blueprints, but the defendant refused to release the original tracings for the purpose of having these blueprints made.

Plaintiff in May, 1931, signed a proposed supplemental contract covering the changes placed on the drawings, and carrying no change in contract price and no extension of

contract time. The proposal was not accepted by the defendant, but it submitted instead for plaintiff's approval another proposed form of supplement in which a list of corrections and additional dimensions, fully describing revisions placed on the drawings, was set out. This supplement was proposed by the defendant June 9, 1931, and was not signed by plaintiff until February 4, 1932. The work, in the meantime, had been going forward with the corrected plans.

Plaintiff has introduced expert testimony to the effect that marked-up drawings such as these tend to cause confusion and delay, but there is no evidence that the drawings caused confusion or delay on this job. Plaintiff's superintendent in charge of construction, Walter Landin, was not called as a witness to testify to difficulties in construction resulting from the use of the plans furnished, and plaintiff has not proved any delay or resultant damage due to the refusal to provide new blueprints.

Claim for delay in furnishing detail drawings

14. Article 2 of the contract provides:

> The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided.

Paragraph 11 of the specifications provides:

> *Drawings.*—The mechanical drawings are intended to more fully explain the architectural drawings; therefore any thing required by either one or the other shall be furnished and executed the same as though specifically shown on both.
>
> The drawings and specifications shall be considered as giving the general character and extent of the work. Parts not specifically detailed shall be constructed in a manner and spirit conforming to the class of work required; so as to maintain the strength and complete the whole of which they form a part and insuring a successful operation of the mechanical equipment. When parts only of the building and equipment are shown, the remainder shall be a repetition, and where any detail is started upon a drawing it shall in construction be carried the full length of the part it details.

> Additional scale and full-size drawings may be furnished by the architects if required to more fully explain the manner in which the above-mentioned drawings shall be carried out, and the scale and full-size drawings shall be binding upon the contractor under this contract. Full-size drawings shall take precedence over all scale drawings, and any work done in advance of such full-size details shall be at the risk of the contractor. Figured dimensions on all scale drawings shall govern in laying out the work, and no work shall be executed from dimensions obtained by scaling.
>
> All drawings and specifications furnished the contractor are the property of the architects and must be returned to him or satisfactorily accounted for before the final certificate for payment is issued.
>
> Copies of drawings and specifications and all details furnished the contractor and of all approved shop drawings shall at all times be in the possession of the contractor's superintendent at the building.

Soon after work was commenced, the architect wrote plaintiff requesting information regarding the sequence in which it desired detail drawings to be furnished. Such information was not supplied. The architect instructed his superintendent at the site to keep him informed, in advance, of construction progress in order not to delay the work. During the progress of the work, detailed drawings were frequently furnished to plaintiff. At least 400 detailed drawings were so submitted. Plaintiff has not proved any specific damage resulting from delay in furnishing detail drawings.

Delays in submitting details for ornamental face brick

15. On February 21, 1931, the architect forwarded to plaintiff 18 detail drawings, showing development of the exterior brickwork. They were not completed drawings for construction purposes, but were furnished in order to expedite the letting of subcontracts for certain brick. Plaintiff objected to furnishing the large number of special shaped brick which the architect had shown on his detail drawings. Plaintiff contended that the specifications required only 15 shapes to be furnished for the entire project. Certain paragraphs of this specification provided the following:

64. *Face brick.*—Face brick shall be a soft mud sand mould brick made in wooden moulds overburned to such a degree as to form blotches of iron coming out on the face and other parts of the brick in a clinker form.

Contractor shall allow $28.00 per M for brick FOB cars, Lewisburg, Penna.

Special shaped brick matching the face brick in color and texture shall be provided wherever special shapes are necessary. Face brick for arches and pattern work shall be shaped to provide regular soffits and joints of uniform or radial widths as the nature of the work may require.

All face brick to be laid with 3/8″ joints and unevenly as to course jointing as specified for block. Joints are to be flush struck or weathered as determined by the architect.

65. *Moulded brick.*—All moulded brick shown, including corner blocks, are to be specially made in the same clay as the bricks. These special bricks are to be made in as large size as the clay will burn without too much warping. Some warping of the special brick is not only permissible but desirable. It is the intention that the brick shall be rough, that the special brick shall also be rough as well as the terra cotta. The contractor shall figure on 15 different shaped special brick so designed that they may easily be pressed into a hand brick mould.

Paragraph 20 of the specifications provided:

20. *Clarity of plans.*—The contractor shall carefully check up all plans and specifications immediately upon their receipt and prior to his estimating and to call the architect's attention to any discrepancies or to any point which may not be entirely clear to him. If there should be two ways shown on the plans, or two possible inferences in the specifications of doing any one thing, the contractor is to make no decision himself but is to refer the matter to the architect. The burden is hereby clearly put upon the contractor to find out what the intent of the plans and specifications is if he does not understand them as drawn.

If there is a lack of clarity in the plans and specifications or if any part of either plans or specifications seem to conflct with any part of either one or the other of them, the contractor must call the architect's attention to the same at the time of his estimating them before he submits his bid for a ruling. If he submits his

bid without raising any question as to any ambiguity either in the plans or the specifications, then the ruling of the architect as to the true intent and meaning of the plans and specifications shall be final.

The architect ruled that paragraph 65 of the specifications referred to ornamental string course brick only, that paragraph 64 of the specifications provided for the use of shaped brick wherever special shapes are necessary as indicated on the contract plans. Plaintiff refused to accept this ruling of the architect. Subsequently, as a result of a conference, it was agreed that 29 shapes of brick were to be furnished by plaintiff. On April 18, 1931, the architect submitted revised brick details to plaintiff in conformity with this understanding. Plaintiff entered into its subcontract for face and shaped brick on May 12, 1931.

On May 29, 1931, the architect forwarded to plaintiff completed brick details for construction purposes. The laying of brick began on August 5, 1931.

We do not find that the defendant was at fault in the disagreement relating to the number of shapes of brick.

Delay, return of shop drawings

16. Paragraph 22 of the specifications reads:

> *Shop drawings.*—All shop drawings are to be made in triplicate and sent first to the general contractor who will check these over for all dimensions and be entirely responsible for the correctness of all figures, dimensions, etc. They are then to be sent to the architects in triplicate, who will approve same for architecture, design, etc., but not for dimensions or sizes other than those which may come generally under the specifications. The architect will keep one for his files and return two to the contractor.

It is not proved whether or not plaintiff checked shop drawings submitted by subcontractors as it agreed to do in the foregoing paragraph. When plaintiff forwarded the shop drawings to the architect, no notations or corrections appeared on them to show that plaintiff had checked them and the architect assumed that it had not. The architect accordingly undertook this work and acted upon shop

drawings, either approving them or returning them for correction. Plaintiff's practice caused the architect to devote more time to checking shop drawings than would have been necessary if plaintiff had made clear to the architect that it had checked them.

The architect kept a ledger record showing the dates of submission, rejection, and approval of all shop drawings, which indicates that he was returning shop drawings with reasonable promptness. About 1,600 shop drawings were submitted to the architect for approval, many of which were submitted directly to the architect instead of having been first submitted by the subcontractors to plaintiff.

We do not find that the architect was unreasonably slow in checking and returning shop drawings.

Delay, hospital equipment contract

17. The specifications provided that the defendant should purchase, under separate contract, certain of the hospital electrical and kitchen equipment. Plaintiff's contract provided that it should install this equipment, together with the necessary piping, conduits and connections. The hospital equipment was not required to be on the site until plaintiff had completed roughing-in of the conduit and piping leading to this equipment. On September 8, 1931, plaintiff wrote the architect that it was working in the kitchen area of the hospital building. On September 9, 1931, the architect sent plaintiff detailed drawing No. 311, giving all equipment measurements necessary. Plaintiff was not ready, prior to September 9, 1931, to proceed with its work requiring roughing-in measurements for equipment in the hospital building.

Delay, hardware award

18. The specifications indicated that certain finished hardware was to be furnished by the defendant, but the allowance for the same did not include all the hardware to be used on the job. Paragraphs 276 and 276 (a) of the specifications provided as follows:

> 276. *Hardware.*—Contractor is to allow $32,500.00 for hardware allowance, for hardware FOB Lewisburg, Pa.

Contractor is to haul to job and set all hardware, but this is not included in the hardware allowance.

(a) Hardware to be carefully protected. The Hardware under hardware allowance does not include hardware for windows, all iron grilles, glass and metal partitions, and Disciplinary Building cell block doors, or rough hardware. All such hardware is specified to be furnished and set by contractors furnishing the above work.

Because it is customary to install finished hardware near the completion of a job, it was not necessary for the hardware to be furnished until late in the work of construction. However, plaintiff should have been furnished a hardware schedule showing the kind of hardware to be applied, together with templates, or models of the hardware, for metal doors and frames, in order that the manufacturer of such metal work might make provisions for the type of hardware later to be installed. There is testimony that because of delay by the architect in furnishing template information, metal doors had to be planed on the job for the fittings of hinges. There is no evidence as to the number of such doors, or the time, cost, or delay involved in such work.

Other delays

19. Plaintiff claims that the defendant made changes which were outside the scope of the contract; that it held proposed changes under consideration an unreasonable length of time and interfered with the orderly progress of the work, causing plaintiff increased expense. The changes complained of include the reduction of ornamentation, the redesign of the entrance gate building, the addition of fire stairs in the buildings, the lowering of footings in the mess hall, the increase in the size of the storm sewer, and the change in the type of factory. Plaintiff agreed in supplemental contracts to make those changes, as well as all other changes, and where extra work or material were necessary, it was paid for them, together with 10% for overhead and 10% for profit. It has not proved that any specific or approximate amount of damage resulted from any of the changes.

There is evidence that plaintiff was itself dilatory on occasions in responding to the defendant's invitations to submit

proposals for changes, but there is no proof that its conduct in that regard delayed the progress of the work in any ascertainable amount.

Increased costs

20. The amount of increased costs claimed as a result of the defendant's alleged delays and interference is $285,249.59. It represents the total of the claimed increased field construction costs, exclusive of material permanently incorporated in the structure, but including overhead costs, as set forth by plaintiff in its petition on pages 12 and 13, as modified in its briefs.

The tables set forth on pages 12 and 13 of plaintiff's petition list, in the first column, forty-seven items, specifying the branches of construction considered. Opposite each branch are columns listing "actual cost," "reasonable cost," and "increase." Then by adding "office overhead" and "10% profit", plaintiff arrived at its "total increased cost". In its brief plaintiff abandons its claim to 10% profit on these items. Plaintiff contends that delays by the defendant during the course of construction increased its costs in these several branches of construction. However, plaintiff's testimony regarding the length of these delays, as well as the damages resulting therefrom, is indefinite. As to many alleged causes of delay, no evidence was offered to show that they did in fact cause delay, or what financial harm resulted. Plaintiff offered five witnesses, all of whom were experienced builders, and one of whom was president of plaintiff company, as experts, in support of the unit prices set forth in its petition as "reasonable cost." Defendant produced witnesses as to the reasonable unit prices for doing the work by branches as listed in plaintiff's petition. Its witnesses were estimators for builders, who had spent several weeks studying the plans and specifications for this project in preparation for submitting a bid thereon. They had available their original estimates on which they had based their bids, submitted in competition with plaintiff's bid for doing this work. They testified that the reasonable cost figures claimed by plaintiff were much too low.

Plaintiff was not compelled to hire a derrick from Pittsburgh solely to lift steel beams into the kitchen area because it was delayed by the defendant in the scheduled performance of its work, as it charges. Plaintiff hired the derrick from Pittsburgh, partly at least, to place steel beams in the roof of the auditorium, having no other derrick available and adequate for the work.

Temporary heat and winter protection

21. Article 10 of the contract provides:

> (1) *Permits and care of work.*—The contractor shall, without additional expense to the Government, obtain all required licenses and permits and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for the proper care and protection of all materials delivered and work performed until completion and final acceptance.

Paragraph 33 of the specifications provides:

> *Water, heat and light.*—The contractor shall furnish at his own expense, all water, light, power and heat required for the carrying out of his work and the work of all subcontractors. Temporary electrical work shall conform to the regulations of the National Board of Fire Underwriters.

The contracting officer did not order plaintiff to provide either temporary heat or winter protection as an extra. Plaintiff was refused a supplemental contract intended to provide additional compensation for furnishing temporary heat.

Several supplemental contracts, relating to changes or extras, increased plaintiff's compensation and extended the time for completion. The evidence does not show to what extent, if any, the defendant wrongfully caused delay in the work during the spring and summer of 1931.

Moulded brick in entrance building

22. It is plaintiff's contention that there were 7,578 units of special moulded brick left unused at the site upon completion of the work, for which plaintiff could make no ad-

justment with the manufacturer. Plaintiff's claim for this item is based on a clause in supplemental contract 93, accepted August 14, 1932, providing for a reduction in the size of the Entrance Gate Building. That clause reads as follows:

> The right is reserved to claim additional compensation under this supplement providing it is found impossible to cancel approximately 51,000 face brick and 11,000 moulded brick required by the contract plans, but not needed for the revised building as covered by this supplement; such claim as presented to be in accordance with the Treasury Department's memorandum dated May 20, 1932, copy attached hereto.

The manufacture of the moulded brick for the Entrance Gate Building was started on June 17, 1932, at which time the brick manufacturer had the revised approved drawings calling for the smaller building, as provided by supplemental contract 93, and he fabricated the brick accordingly. The brick manufacturer was paid only for brick actually released and shipped to the job. He sent checkers to the site periodically to inventory the brick on hand in order to be sure that excess moulded brick would not be delivered to the site. Any brick left unused did not come within the scope of the agreement above quoted.

Emergency surcharge on freight

23. On January 4, 1932, an additional tariff went into effect, which consisted of an emergency surcharge on freight rates. Plaintiff claims that it should be paid the amount of the additional charge by the defendant on the theory that all material on which the increased tariff was paid would have been delivered to the site prior to January 4, 1932, had plaintiff not been held up by delays which plaintiff claims were due to the defendant.

Plaintiff claims the amount of $3,208.58 for this item. Of this amount, the sum of $664.79 was charged against subcontractors involved, who paid it. Plaintiff has added 10% overhead and 10% profit to this sum, making a total of $804.38, which was not paid by it.

It appears that there is a duplication of charges between this item of plaintiff's claim and the item of "extra terra cotta copings," which appears as item No. 7 in Finding 7, *supra*. This duplication consists of charges of 40 cents per ton on all terra cotta shipped after January 4, 1932. Plaintiff has included this charge in both claims.

Extra bulk excavation

24. Paragraph 54 of the specifications contained the following provision:

> The contractor is to estimate on all excavating and fill as shown by grade lines and floor lines on the plans. If there is any variation in the amount of excavation and filling at the site over and above what is called for by the plans this will be adjusted, but the contractor must make any claims for extra digging before he starts his work.

On March 18, 1931, plaintiff, in a letter to the defendant's architect, stated that there were differences in grade levels from those shown on the plans and claimed as additional compensation, the sum of $6,395.00, for the excavation of 14,464 cubic yards of earth.

Mr. Walter Frick, a surveyor residing at Lewisburg, Pa., at the request of a representative of the contracting officer, made a check of the additional bulk excavation required over and above that shown on the plans. He reported the extra amount of excavation to be 8,845.20 cubic yards.

On July 11, 1931, plaintiff wrote the architect regarding supplemental contract No. 44 for the revision of the Enclosure Wall. Plaintiff stated that it was including the item for change in the grade, due to the change in the contours from the contract plans, in its estimate for the enclosure wall. On July 28, 1931, an order was sent to plaintiff instructing it to proceed with the construction of the enclosure wall, pending an agreement as to the amount of additional compensation. The order to proceed read as follows:

> In no event will you be allowed in excess of $36,-326.31 for the work involved, which includes all ad-

justments for additional excavation because of discrepancies in the original topographical surveys.

The parties were unable to reach an agreement as to the amount of additional compensation due plaintiff for the revision of the enclosure wall, whereupon both the architect and plaintiff submitted detailed estimates to the Supervising Architect of the Treasury Department, for decision. The architect's estimator set forth the extra for bulk excavation as follows:

Excavation—Add. 8,845 cu. yds. at 34¢---------------- $3,007.30
Correcting contour plans.
Based on Frick report of May 27, 1931.

Plaintiff's estimator, in his estimate, set forth the extra for bulk excavation as follows:

Item K--------------------Change in grade---------- $6,395.00

Note K—this is a complete amount which was submitted in previous correspondence for change in contour of original site which was submitted in letter of March 18th, and the Great Lakes Construction Company was ordered by Mr. Sanford Bates to proceed with work in letter of March 25, 1931.

The Supervising Architect of the Treasury Department, in deciding the amount of compensation to be allowed for revision of the enclosure wall, considered this item of extra bulk excavation due to the change in grade, and in his estimate, allowed additional compensation therefor as follows:

Change in grade, approximately 10,000 cubic yards at 50¢ per cubic yard---------------------------------- $5,000.00

Added to this amount was 10% overhead and 10% profit, making a total of $6,050.00. The Supervising Architect's lump sum estimate of $18,988.00, which included this item of change in grade, was allowed plaintiff under the provisions of supplemental contract No. 44, without reduction. On September 11, 1931, defendant's architect wrote the Bureau of Prisons, commenting on this estimate made by the Supervising Architect, as follows:

> ITEM 27. This is for the additional excavation required at the job over that shown by the contract drawings. The contractor in your presence and mine agreed to accept Mr. Frick's estimate of this. Mr. Frick's estimate of the increased yardage is 8,845.

Plaintiff has been allowed $6,050.00 for extra bulk excavation claimed in its letter of March 18, 1931, under the provisions of supplemental contract No. 44. The estimator of the Supervising Architect's office, who recommended to the contracting officer approval of plaintiff's claim made to the Comptroller General (see finding 12) in the amount of $5,855.00, testified that such approval was given in error. The contracting officer's representative who compiled the administrative report to the Comptroller General, accepted the recommendation of this estimator, and recommended the allowance of $5,855.00. This recommended action was made in error. Plaintiff was allowed compensation for its extra excavation in Supplement No. 44.

The figure of $18,988.00 which the parties agreed to as the price for the performance of Supplement No. 44 was arrived at as a result of an error in computation, made by the defendant. The figure should have been $20,198.53.

Additional sidewalks

25. The contracting officer disapproved this claim. A dispute arose between plaintiff and the architect while work was being done, regarding certain sidewalks, and what the contract requirements were concerning them. The dispute concerned two sidewalks; one was installed east of cell block B and guards' dining room, and the other was located west of dormitory D and the laundry building. The architect, construing paragraph 20 (see finding 15) of the specifications, ruled that both sidewalks were clearly shown on contract drawing No. 3, and were required to be furnished thereunder. The architect permitted plaintiff to install the cheapest type of sidewalks. Plaintiff appealed from the architect's decision to the contracting officer's representative, and by mutual agreement the question was referred to the Supervising Architect of the Treasury Department, who sustained the architect's ruling, holding, "From a review of the drawings it is evident that walks of some type are required by the contract."

We find that plaintiff was required by the contract to construct the two sidewalks as it did construct them.

The court decided that the plaintiff was entitled to recover only for the items in its petition, as modified by statements in its brief, not contested by defendant.

MADDEN, *Judge*, delivered the opinion of the court:

Plaintiff sues for various alleged breaches by the defendant of a contract between the parties for the construction of a Federal Penitentiary, near Lewisburg, Pennsylvania. The alleged breaches consist of extras ordered and not paid for and of delays in the progress of the work caused by the defendant and resulting in extra costs to plaintiff. As to a number of the alleged extras ordered and not paid for, and as to a small balance due on the contract, the defendant does not contest its liability.

The contract was entered into January 31, 1931, as a result of competitive bidding after advertisement. The contract provided that the work should be completed within 425 days from the receipt by the contractor of notice to proceed. That notice was given on February 14, 1931, thus fixing the completion date as April 14, 1932. The project was a large one, the contract price being $2,781,800.00.

The defendant needed the new penitentiary urgently, in the opinion of its officers, and the preparation of the plans and specifications by the defendant's architect for submission to bidders had been done in less than the usual time. They therefore omitted a good many dimensional figures and details which were later supplied. The omissions were obvious and the bidders, including plaintiff, the successful bidder, seem to have been able to make their estimates in spite of these omissions. On February 21, 1931, shortly after the contract was made, the architect supplied plaintiff a set of blueprints with these additions as well as corrections of errors which had been discovered, made with a colored pencil. There were some seven hundred of these insertions. Others were later made in other colors. Thereupon began an argument which extended through some months, the work going forward meanwhile with the corrected plans, as to whether the defendant or the architect should not supply plaintiff with a new clean set of blueprints containing all the insertions. Finally the defendant refused to release the

original tracings necessary for new blueprints, and they were never made.

Plaintiff introduced much evidence as to these additions to the prints and its efforts to have new prints made. Expert builders testified on plaintiff's behalf that plans marked up in this manner would tend to cause confusion and delay. There is no evidence, however, that the condition of the plans did cause misunderstanding, confusion, or delay in the work. Indeed, Walter Landin, plaintiff's superintendent at the job whose responsibility it was to interpret the plans and see the building constructed accordingly, was not called as a witness, though still in plaintiff's employment at the time of the hearing. We have therefore found that plaintiff has not proved delay or resulting damage due to the refusal to furnish new and clean blueprints.

The defendant made a good many changes in the plans, as distinguished from the insertions discussed above, as the work progressed. Among the largest of these were the following: ornamentation was eliminated; the size of the entrance gate building was reduced; numerous stairways to make the buildings safer from the hazards of fire were added; the type of the factory building was changed. When the defendant proposed a change, as it had a right to do under Article 3 of the contract, plaintiff was invited to make an offer of the reduction in price it would permit or the increase it would ask because of the change. There were frequent and substantial disagreements between plaintiff and the architect about these figures, but in all except three cases they bargained to an agreed figure, or, with the consent of both parties, a figure or basis of determination was set by the supervising architect in the Treasury Department, which was embodied in a supplemental contract. In the three exceptional cases the contracting officer finally set a price, and plaintiff made no protest. Extensions of time were granted, as agreed upon, when these modifications were made. The net total additions to the contract price resulting from these modifications was $157,598.97, and the extensions of time moved the completion date forward from April 14, 1932, to November 19, 1932. The project was in fact completed and finally inspected on November 7, 1932.

Plaintiff claims that these agreed additions to the contract price took no account of anything more than the actual additional cost, with overhead and profit, of doing the additional work; that they provided no compensation for delay on the job in general, or in other particulars, caused by the agreed change and the time it took to contract for it and to execute it. In signing the modification agreements, plaintiff told defendant's agents orally that it was going to claim damages for delay, but some 29 out of 109 supplements contained a clause inserted by the defendant to the effect that no damages would be claimed for delay.

Since the contract expressly permits the defendant to make changes and the plaintiff to be compensated therefor as agreed, we think the kind of supplemental agreement contemplated by the contract is one which leaves no further unliquidated claim such as the one asserted here. But we also think, as hereinafter indicated, that even if plaintiff had a right to claim damages for delay caused by modifications of the contract, it has not satisfactorily proved either the delay or the damage.

Plaintiff's theory of proof and recovery as to the largest item of its claim is, in general, as follows. It has sought to show that the blueprints were not in the form approved by good usage, but were in a condition which would tend to cause confusion and delay. It has proved that numerous changes were made by the defendant in the project in the course of construction, and time was consumed in the settling of these changes; that some mistakes were made in the specifications which mistakes had to be corrected before the building could be built. It has presented evidence intended to show that the architect was more artistic than practical, and was difficult to get on with. Having presented this evidence tending to show fault on the part of the defendant, it then presented evidence showing what its actual construction costs were in each branch of its work, according to a table set out in its petition, and the total of such costs, amounting to $535,758.19. It then presented as witnesses several experienced builders, including plaintiff's president, one or more of whom testified with reference to each branch of the work that its cost under proper and usual

conditions at the time and place should not have been more than a named figure.[1] The total of these figures is $271,-077.34. It then points to the difference between the actual costs and the alleged proper costs and says, "This difference, which with office overhead amounts to $285,249.59, is the damage caused by the inadequate blueprints, the numerous change orders, the errors in the specifications, the unreasonableness of the architect, and the rest of defendant's conduct here complained of."

Plaintiff seeks to recover under this blanket proof without proving the fact that any one or more of the asserted faults of the defendant caused any specific delay or any, even estimated, amount of damage.

We recognize and have recently applied the doctrine that if we find that a plaintiff has been legally wronged, a certain unavoidable indefiniteness in the proof as to just how much money it would take to compensate him for the wrong will not prevent a recovery of a sum which the court concludes will fairly approximate that compensation.[2] That doctrine is not applicable here because neither the particular alleged faults of the defendant, nor the sum of all of them, constituted a legal wrong to plaintiff unless they caused damage. That the blueprints from which the building was built were not in conventional order; that the architect was artistic and difficult; that a good many changes were made in the plans of the building, the contract expressly giving the defendant the privilege of making changes; that the defendant was, in some cases, dilatory in finally approving changes; none of these things, even if we regarded them as proved, would constitute actionable breaches of implied terms of the contract here in suit unless they at least substantially harmed plaintiff. But there is no tangible evidence that they harmed plaintiff except the general testimony that the reasonable construction cost on the several branches of the work, and on the whole of it,

[1] Witnesses for the defendant, estimators for builders who had bid on the job, but whose bids were higher than plaintiff's, testified to "reasonable cost" figures much higher in many branches, and in the aggregate, than plaintiff's reasonable cost figures.

[2] *F. Mansfield & Sons Co.* v. *United States*, 94 C. Cls. 397.

should have been not more than a named figure. There is no satisfactory evidence, and scarcely even an attempt to show, that because of certain specified conduct on the part of the defendant, certain work of plaintiff was delayed by a certain number of days, keeping men and machines idle, or otherwise harming plaintiff by an amount capable of even approximate measurement.

We note here again the failure of plaintiff to produce its construction superintendent whose job it was to keep the work going forward for plaintiff. He is the one who would have known what delays were caused, and whether and how they were harmful. The architect's superintendent, who was also constantly on the job, testified that work which was otherwise ready to be done was not substantially delayed for the reasons charged. In this condition of the evidence, we cannot find that plaintiff was delayed and damaged in any ascertainable amount by the defendant's alleged wrongful conduct.

Plaintiff is entitled to recover a total of $50,413.25, made up of the following items, not contested by the defendant.

Correction in screens	$121.12
Connecting kitchen equipment	1,801.69
Enclosure wall extras	12,773.77
Extra terra cotta copings	9,527.76
Extra cinders	3,827.47
Added hospital equipment	387.20
Added stack work	450.00
Supp. 70 (70 A)	47.72
Supp. 44	20,198.53
Balance due on contract	1,277.99
	50,413.25

It is so ordered.

JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

CASSIDY & GALLAGHER, INC., v. THE UNITED STATES

[No. 43704. Decided February 2, 1942]

On the Proofs

Government contract; inspection of site by contractor; extra expense.—Where plaintiff, a contractor, entered into a contract with the Government for the erection and completion of one set of five special skeleton steel radio masts with concrete foundations; and where before submitting its bid plaintiff inspected the site; and where plaintiff agreed to a change of site with no increase or decrease in price; and where in excavating for foundations water was struck, necessitating additional expense; it is *held* that plaintiff is not entitled to recover.

Same.—The Government made no representations as to conditions at the site other than as disclosed by the proposal conditions, the specifications and other contract provisions; there was no concealment, no withholding of information and consequently no reliance.

Same.—The plaintiff's method of meeting the conditions encountered was inefficient and not in accord with good engineering practice.

The Reporter's statement of the case:

Mr. Edward Gallagher for the plaintiff.

Mr. Henry Fischer, with whom was *Mr. Assistant Attorney General Francis M. Shea* for the defendant. *Mr. Newell A. Clapp* was on the brief.

The court made special findings of fact as follows:

1. Plaintiff is a corporation organized and existing under the laws of the State of New York, having its principal offices at Albany, New York. On July 24, 1934, it entered into a written contract with the defendant, whereby the plaintiff agreed to furnish all labor and materials, and perform all work required for the erection, wiring and painting, etc., complete, of one set of five 125-ft. special skeleton steel radio masts with concrete foundations, etc., for the consideration of $4,639.00, plus such additional work and materials as might be required and actually furnished in connection therewith at specified unit prices. The work was to be commenced within 10 days from receipt of notice to proceed or the effective date thereof, and be

completed within 45 calendar days from receipt of notice to proceed or the effective date thereof.

2. Notice to proceed was received by the plaintiff October 1, 1934.

Receipt of the notice October 1, 1934, placed the date for completion as not later than November 15, 1934. The work was actually completed December 14, 1934, a delay of 29 days.

3. Plaintiff's representative visited the site of the work before the bidding. About 100 feet north of the proposed location of the towers ran a small stream. Surrounding the site was an abundant growth of vegetation, including trees.

4. On August 22, 1934, the contracting officer sent the following change order to the contractor:

> With reference to the proposed contract based on Proposal 337B for the erection, wiring, painting, etc., of steel radio masts near Albany, it is the desire of this office that the site of the work be changed as indicated on the inclosed drawings RB-1046 and 1046A. RB-1046 shows the location which was intended at the time bids were obtained, and 1046A the location which we propose to use. You will note that the new location is about 122 feet southerly and 32 feet westerly from the original location.
>
> This letter is being sent you in quadruplicate with request that you execute and return three signed copies to this office, retaining the fourth for your files if desired.

The plaintiff endorsed the order at the foot thereof as follows:

> In reference to the above, we hereby agree to the change in site as indicated with no increase or decrease in contract price or contract time.

This change in location had the effect of placing the towers more nearly on the same level, as well as on higher ground and farther away from the stream.

5. After receipt of notice to proceed plaintiff began operations. In excavating for the foundations for four of the towers the plaintiff struck water about two feet below the top soil; at the fifth site conditions were not so bad.

On October 13, 1934, plaintiff protested against performing the work at the agreed price and in the agreed time under the conditions thus encountered, set forth the situation and demanded of the contracting officer an extension of time and reimbursement for additional labor and material.

George E. Stratton, Airways Engineer, for the Assistant Director, Bureau of Air Commerce, Department of Commerce, responded to this demand by letter dated October 20, 1934, as follows:

> We are in receipt of your letter of October 13, reporting the difficulties of excavating for the tower bases at Albany in connection with your contract of July 24, 1934, contract No. Cba 241. It will not be possible for us to grant you an extension of time nor additional compensation because of these unforseen subsurface conditions inasmuch as the proposal on which bids were obtained particularly specified that bidders must familiarize themselves with local conditions and make their own estimates of the difficulties attending the execution of the contract, including subsurface conditions. See paragraph 17 of the proposal conditions forming a part of the contract. The contract also specifically provides in paragraph 6 (c) of specification No. 743 that "no additional compensation will be allowed on account of any excavation or backfill being wet or frozen."

There is no proof that at the time the contract was entered into or before the work was commenced the defendant was in possession of knowledge concerning subsurface conditions not also known to the plaintiff.

6. November 6, 1934, the plaintiff in letter to the contracting officer set forth its claim as follows:

> We are in receipt of your letter of October 20th and are surprised that you do not think we are entitled to an extension of time and compensation for additional labor and material. Apparently you are unaware of the true conditions.
>
> When we submitted our proposal to you, we naturally expected the work to be started within a reasonable time, but the record will show that it was months after we submitted our proposal and weeks after we furnished a bond that we were allowed to start work on our contract. It took you ten or twelve weeks to

clear the site when it should have been done in one-third of the time. The length of time it took does not concern us except for the fact that it forced us to do our work in the rainy part of the fall season. Fulfilling our contract at this time cost us more money and took more time. We believe we are entitled to an extension of time for this reason alone.

When you say that the specification covers the conditions we are encountering in the excavation, we do not agree with you. We read the specification and carried out its meaning. We spent a whole day inspecting the site. We counted as closely as possible every tree that was to be moved so we can honestly say that we looked over conditions at the site. We found no indication of water anywhere. We still believe that you should have made tests, which is customary of the government, and advised bidders as to the real conditions. In clearing the site, you evidently found conditions different from what you expected because you changed the original location of the towers on account of the water.

We believe we are entitled to an extra. It certainly is an unusual condition when it was necessary for us to use a steam shovel and a gas water pump in order to excavate for concrete bases of such small dimensions. We had to pump from thirty to fifty thousand (30,000–50,000) gallons of water out of the excavation every morning. Your engineer's time report will also show the actual working hours it took to do this work, besides the cost of equipment.

We have been forced to suffer a financial loss due to an oversight of your office and we intend to take what steps are necessary to get fair treatment.

7. August 28, 1935, the contracting officer wrote to the plaintiff as follows:

The Bureau is preparing a report to the Secretary of Commerce on your claim for extra compensation under Contract Cba–241 for the erection, wiring, and painting of the radio masts at Albany, and as soon as this report has been approved your voucher in the amount of $4,538.08 will be referred to the General Accounting Office for settlement in such amount as the Comptroller General considers proper. The report referred to, together with your certified statement and the analysis prepared by your attorneys, will be inclosed to the Comptroller General with the voucher.

It will be necessary for us to have ready for inclosure also a release signed by your company as required by paragraph (f) of Article 5 of the proposal conditions forming a part of the contract. We have, therefore, prepared a release for the undisputed amount of $2,218.08, and we have included therein an exception for the extras which you claim, that is, $52.50 for extra concrete and $2,267.50 for extra labor and materials and the hire of equipment due to subsurface conditions. It is requested that you execute and return three copies of this release. You may retain the fourth copy for your files.

The voucher, your certified statement of facts, and the analysis of your attorneys, which were received by the Bureau with the letter of August 2 from O'Connell & Aronowitz addressed to the office of Congressman Parker Corning, were not accompanied by your itemized statements showing the method of arriving at the amounts of $2,267.50 and $52.50 for extras. It is requested that those statements be inclosed with your reply forwarding the release.

It is suggested that you give the matter immediate attention inasmuch as the papers cannot be forwarded to the General Accounting Office until the release and itemized statements have been received.

8. The presence of water necessitated additional expense above what the cost would have been for dry excavation. The additional expense incurred was $2,267.50 (including profit of $206.14).

The plaintiff's method of meeting this condition was inefficient and not in accord with good engineering practices. All that was necessary was to dig X-shaped trenches, approximately 10 feet long, 9 feet deep and 2½ feet wide. Instead, plaintiff used a clamshell and proceeded to dig circles 30 to 35 feet in diameter for each tower. This method required repeated and much more extensive pumpings than would have been necessary had proper methods been employed, and also made it impossible to use the excavations as form work for the concrete footings.

There is no proof that the Government withheld any amount for liquidated damages for delay.

The court decided that the plaintiff was not entitled to recover.

JONES, *Judge*, delivered the opinion of the court:

Plaintiff seeks recovery of excess costs incurred in completing a contract with the Government.

The contract called for the construction of five steel radio masts, 125 feet in height, with concrete foundations, near Albany, New York.

The contract price was $4,639.00. The structures were to be completed within 45 days after receipt of notice to proceed.

The plaintiff asserts that it encountered unforeseen difficulties in the way of subsurface water conditions which made it necessary to expend $2,267.50 for labor and materials above the amount originally contemplated.

For this sum it sues, together with $180.00 which it claims was wrongfully charged against the contract as liquidated damages for delay in completing the work.

The contract was signed July 24, 1934. The site was covered with trees and undergrowth. These were cleared by defendant and notice to proceed was given plaintiff October 1, 1934.

Plaintiff's representative visited the site before the bidding. A small stream ran about 100 feet north of the location. Defendant's witness, the supervising engineer, testified that a swamp was located on the site, with dense undergrowth and a small pool of water. Plaintiff admitted the presence of trees and undergrowth, but denied that there was any swamp or pool of water on the premises at the time its representative made the inspection.

No borings were made by either plaintiff or defendant.

In making excavations for four of the towers the plaintiff struck water near the surface, requiring more labor and material than would have been necessary had such water not been encountered.

Plaintiff claims compensation under Article 4 of the contract which provides for adjustment should the contractor encounter, or the Government discover, during the progress of the work, subsurface or latent conditions at the site mate-

rially differing from those shown on the drawings or indicated in the specifications.[1]

The invitation to bid contained certain proposal conditions, among which was a provision that bidders were expected to familiarize themselves with local conditions and make their own estimates of the difficulties attending the execution of the proposed contract including "subsurface conditions and all other contingencies."

The specifications, which were a part of the contract, contain the following:

> 5 (b) Payment for excavation, sheeting, shoring, pumping, bailing, draining, backfilling, levelling, etc., shall be included in the prices bid in the schedule for the complete work; * * *
>
> 6 (c) No additional compensation will be allowed on account of any excavation or backfill being wet or frozen.
>
> 7 (c) In case of soft soil, or for other reasons, the contracting officer may order in writing (or by telegraph) that foundations be carried more than the minimum depth.

Other than as disclosed by the proposal conditions, the specifications and other contract provisions, the Government made no representations as to conditions at the site. There was no concealment, no witholding of information, and consequently no reliance.[2]

Of the three specification provisions above quoted 7 (c) is the only one that mentions changes in specification requirements that might call for the application of Article 4 of the contract. It provided that the contracting officer, on account of soft soil or for other reasons, should have the right to

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[1] ART. 4. *Changed conditions.*—Should the contractor encounter, or the Government discover during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in article 3 of this contract.

[2] *Trimount Dredging Co.* v. *United States,* 80 C. Cls. 559, 574; *General Contracting Corporation* v. *United States,* 88 C. Cls. 215, 248; *Blakeslee & Sons, Inc.* v. *United States,* 89 C. Cls. 226, 250; *James Stewart & Co., Inc.* v. *United States,* 94 C. Cls. 95.

order foundations carried to more than the minimum depth. No such order was issued.

The fact that the way is left open for adjustments under 7 (c) while conditions set out in specifications 5 (b) and 6 (c) are affirmatively included within the prices bid strongly indicates that the conditions plaintiff complains of were included in his undertaking. (See above.)

While plaintiff was required to do more work than he evidently thought he would be called upon to do, he was given full opportunity to find out the facts. Nothing was withheld from him. The nearby stream was visible, as were the trees and undergrowth. He visited the site. He made such inspection as he saw fit. The specifications called for the meeting of certain conditions. With these facts before him he entered into the contract.

Plaintiff contends that he encountered extraordinary subsurface and latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications. The record as a whole does not justify this contention. Both the surface conditions at the site and the wording of the specifications strongly indicate notice or warning of subsurface conditions likely to be encountered. However, it is not necessary to decide this question since the contracting officer ruled adversely on the claim for additional costs and specifically declined to grant the same in a letter dated October 20, 1934. The plaintiff took no appeal from this decision to the head of the department as required by Article 15 of the contract.

Even if plaintiff were otherwise entitled to recover, we do not think the evidence shows what additional expense was necessary. The actual expense was set out, but the evidence reveals that plaintiff used a far more expensive method than good engineering practice required.

The foundations were X-shaped, approximately 2½ by 10 feet.

The supervising engineer suggested to plaintiff that by making this type of excavation much less work and expense would be involved, that it would not be necessary "to form the foundations below the ground surface because the shoring would act as the form," and that this would require far less pumping and bailing than the method used.

Instead, the plaintiff, upon recommendation of a subcontractor, rented a clamshell (owned by the subcontractor) at $75.00 per day and excavated an area 30 to 35 feet in diameter for each tower. It was necessary to pump this area dry and build forms all the way to the subgrade depth, again empty the excavated area to set the reinforcing steel, and again empty the excavation in order to pour the concrete. It was necessary to move the pump from one location to another and move it back again for the next pumping. Much of this work and expense would have been avoided by using the method suggested by the supervising engineer.

The defendant should not be held responsible for a method that was far more cumbersome and expensive than necessary. The record fails to show what outlay would have been necessary had the proper method been used, only that it would have been much less expensive and would have called for less operating time.

In the circumstances the proof of extra necessary cost is unsatisfactory, even though defendant's liability were conceded.

The record does not disclose whether defendant withheld any amount for liquidated damages on account of the delay in completing the contract. In this state of the record no recovery can be had for this item.

It follows that the petition must be dismissed.

It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

MAX J. KUNEY v. THE UNITED STATES

[No. 43972. Decided February 2, 1942]

On the Proofs

Government contract; delay and extra expense caused by defendant.—Where, in response to advertisement by the Procurement Division of the Treasury for bids for the furnishing of a rock-crushing plant on an hourly basis and in the alternative on a cubic-yard basis, plaintiff, a contractor, submitted bids, which were accepted; and where upon inquiry plaintiff was referred

for information as to the work and conditions under which it was to be performed to a representative of the Works Progress Administration, who informed plaintiff that the crushed rock would be removed promptly by the defendant from the crushers and would be piled in stock piles so that there would be no delay to plaintiff in the crushing of the rock; and where the crushed rock was not so removed but was allowed to accumulate in the bunkers; and where delay and extra expense were thereby caused to plaintiff; it is *held* that plaintiff is accordingly entitled to recover.

Same; acceptance of bid after stipulated date; performance of work.—Where plaintiff's offer to crush the rock was made on condition that the bid be accepted within 10 days from the opening of the bids; and where said bid was not accepted within that time, and, therefore, plaintiff's offer expired; it is *held* that a contract was entered into when said bid was later accepted by defendant and plaintiff prepared to go ahead with the work, notified the project engineer of his intention to do so and did perform the work.

Same; renewal of contract recognition of its terms.—Where the work was not completed within the specified time; and where, thereupon, defendant presented to plaintiff a renewal of the contract which plaintiff accepted; it is *held* that this "renewal" was a recognition of the original contract.

Same; implied condition.—It was an implied condition of the contract that defendant would not delay plaintiff in the performance of the work.

The Reporter's statement of the case:

Mr. Herman J. Galloway for the plaintiff. *King & King* were on the brief.

Mr. E. L. Metzler, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiff, Max J. Kuney, a citizen of the United States residing in Spokane, Washington, was engaged in the construction and contracting business in 1936, doing business under the name of Max J. Kuney Company, with his principal place of business in Spokane, Washington. He was and is now owner of the Max J. Kuney Company.

2. Under date of April 3, 1936, the Procurement Division of the Treasury Department invited bids directed to the procurement of crushed stone to be furnished the Works

Progress Administration, which stone was to be used in connection with the surfacing of what is known as the "Palouse Highway project," near Spokane, Washington. The invitation specified the furnishing of a rock-crushing plant completely equipped for operation, including bunkers of 100 cubic yards' capacity provided with bins to separate three sizes of crushed rock. The location of the quarry in which this rock-crushing plant was to be used was designated as follows:

> The quarry is to be furnished by Spokane County, and is located three (3) miles southeast of Spokane—one-half (½) mile from the center line of the Palouse Highway.

The bid was to be submitted in alternative form, both on an hourly rental basis for the plant and equipment and at a unit price per cubic yard output.

3. Prior to bidding, the plaintiff went to the local office of the Works Progress Administration in Spokane to inquire concerning the work covered by the invitation to bid, and was directed by that office to the office of L. H. Rubicam, engineer and project supervisor in charge of the work.

Plaintiff and Rubicam visited the site of the work and Rubicam showed plaintiff the location of the quarry and the location of the stock-piles site which was within 300 to 400 feet of the quarry. Rubicam advised the plaintiff that the Government would promptly take the crushed rock from the bunkers and remove it to the stock piles, and that there would be no delay caused plaintiff by such removal. Rubicam had no authority to enter into a contract for the Government and it was not shown that he was authorized by the contracting officer to make these representations.

Plaintiff also inspected the roadbed where the crushed rock was to be used and concluded that it would not be sufficiently completed to receive the rock within the time he expected to crush it. He, therefore, concluded that the use of stock piles would be necessary.

4. On April 9, 1936, plaintiff submitted a bid for the furnishing of a rock-crushing plant of 40 cubic yards' capacity per hour, together with a 3-bin, 100-yard bunker, operator, and all necessary equipment, tools and accessories at

$20.00 per hour. He also submitted a bid for the rental of the crusher on the basis of 58 cents per cubic yard of crushed stone. Under this bid it was necessary for him to furnish, in addition to the machinery, equipment and personnel listed above, fuel and oil, and a sufficient crew to operate the equipment.

The bid was submitted "in compliance with the above invitation for bids, and subject to all the conditions thereof." It was also submitted on condition that it should be accepted within ten days from the date of the opening of the bids, and that the work was to be done, "unless otherwise specified, within forty-five days after receipt of order."

5. Plaintiff's bid was not accepted within the ten days specified, but was accepted on May 26, 1936, the acceptance form on the invitation for bids having been signed by E. M. Quinn, State Procurement Officer. The bid accepted was the one offering to rent the equipment for a compensation of 58 cents per cubic yard of crushed stone. A complete copy of the contract is attached as exhibit "A" to plaintiff's petition, except that the blank in the bid after the word "f. o. b." was not filled in, and the blank after the word "within" was not filled in. In the first blank should be inserted the word "project", and in the second blank the words "forty-five" should be inserted. Said invitation for bids and bid are made a part hereof by reference. They constitute the only written contract, if any, that was entered into between the parties.

6. Plaintiff made no response to this tardy acceptance of his bid, but on June 18, 1936, he began operations, but under the following circumstances: A few days prior to beginning operations the aforesaid L. H. Rubicam notified plaintiff that he had selected another quarry site. Plaintiff agreed to do the required work at this site, but with the understanding that the stone should be removed from the bunkers promptly upon being crushed and dumped in stock piles.

A few days later Rubicam orally advised plaintiff that no stock pile sites had been procured and that the crushed rock would be hauled direct from the bunkers to the roadway where it was to be used. The plaintiff orally protested such procedure on the ground that delays would occur, resulting in increased cost to plaintiff, but was orally assured by Rubi-

cam that he would recommend that plaintiff be paid the increased cost on account of the change in operations, and plaintiff accordingly moved to the new quarry site, installed a plant of 50 cubic yards' capacity, and arranged with the Government engineer for keeping a record of any delays that would occur because of lack of stock piles.

7. On June 21, 1936, the plaintiff confirmed the conversations referred to in the previous finding in a letter to the Works Progress Administration, as follows:

JUNE 21, 1936.

WORKS PROGRESS ADMINISTRATION,
Realty Building, Spokane, Washington,
Att'n: Mr. Leslie H. Rubicam.

DEAR SIR: We present this letter to confirm our conversations advising you that the changes ordered in the operating plans upon which our bid was based will inevitably result in costs considerably in excess of those pertaining to the specifications of our contract, and with no corresponding benefit to us.

The abandonment of the stock pile method of rock storage and the requirement that we store all of our rock production in our bunkers and carry on operations at our plant at all times to accommodate all the operations of hauling, spreading, processing, and rolling rock on the road is a material change and when we are required to sychronize our operations with numerous others over which we have no control the additional cost of this is inevitable and, we believe, understood and admitted.

From your standpoint we appreciate that this change is well merited as a major saving to the Government and on that ground we do not protest, but we do protest it unless an adjustment is made from the Government's savings sufficient to cover our increased costs. This amount is impossible to determine at this stage, but pending this determination we request that you cause your inspectors to keep records of time during which we are compelled to stand by and operate our plant without production, and we suggest that you compare these records with ours from time to time so that there will be an agreement upon which to form a basis for an equitable adjustment.

In the meantime, we are proceeding with the work ordered in accordance with the changes.

Yours very truly,

MAX J. KUNEY, *Manager.*

8. The invitation for bids specified that the crusher might be rented according to the terms of the invitation for bids after the expiration of the rental period, but not longer than June 30, 1936. On June 30, 1936, only a small portion of the required rock had been crushed, and the defendant decided to further rent the equipment. It, accordingly, presented to the plaintiff a paper denominated "RENEWAL OF CONTRACT NUMBER ER-TPS-93-1430 WITH MAX J. KUNEY COMPANY." This document read as follows:

> The undersigned hereby agrees to the renewal of the above contract for a rental period of 3 months from date of expiration on June 30, 1936, at the original rental rate, which is at the rate of fifty-eight (58¢) cents per cubic yard. The estimated number of working months (hrs. or days) required to complete this project is 3 months.
>
> The undersigned further agrees that this contract may be cancelled by the Government by five days' written notice.
>
> Signed:
>
> Max J. Kuney Company,
> R. T. McAndrews, Title: *Office Mgr.*
>
> Address: 124 E. Augusta, Spokane, Wash.
>
> Renewal of the above contract accepted on July 14, 1936, effective upon expiration of the original rental period.
>
> (s) E. M. QUINN,
> *State Procurement Officer.*

It was duly executed by Max J. Kuney Company and was accepted by the Procurement Officer of the Treasury Department on July 14, 1936, effective upon the expiration of the original rental period.

9. The Government issued purchase orders, dated May 26, 1936 and July 25, 1936, for an estimated yardage of 52,939 cubic yards of crushed rock at $0.58 per cubic yard, and the plaintiff delivered to defendant a total of 53,901 cubic yards of crushed rock, none of which was placed by defendant in stock piles, but all of which was removed by defendant from plaintiff's bunkers to the roadway.

Plaintiff has been paid by defendant at the rate of $0.58 per cubic yard for the 53,901 cubic yards of crushed rock, the

cubic yards and the sums to be paid therefor being certified to by L. H. Rubicam as project superintendent.

10. Defendant's procedure in hauling the crushed stone from the bunkers of the crushing plant directly to the roadway, instead of piling it in stock piles, caused the rock crusher to shut down 56 times for periods ranging from 15 minutes to 10 hours and 10 minutes. It was shut down 9 times for periods ranging from 30 minutes to 1 hour; 17 times for periods ranging from 1 hour to 2 hours; 16 times for periods ranging from 2 hours to 4 hours; and 7 times for periods ranging from 4 hours to 10 hours and 10 minutes. In addition, there were 7 delays of between 15 minutes and 30 minutes. No record was kept of delays of less than 15 minutes. The total delays of 30 minutes or over aggregated 121.8 hours during the entire period of operation from June 18, 1936 to August 10, 1936. The cause of these shutdowns was that the bunkers were full of crushed stone and no more rock could be fed into them, causing the shutting down of the crusher until the stone was removed. It was necessary, however, to keep the machinery in operation and the crew available pending the arrival of defendant's trucks and the removal of the stone from the bunkers. Upon removal of the stone from the bunkers, crushing operations were immediately resumed, and there was available for defendant's trucks at all times sufficient crushed stone.

11. In June 1937 plaintiff presented a claim to the Treasury Department for payment of increased cost incurred by him due to the delay in the removal of the crushed stone from the bunkers, but this claim was disallowed.

12. A fair and reasonable rental value of plaintiff's equipment for the time it was idle was $24.00 per hour, and for the total period plaintiff's equipment was idle due to delays of the defendant in removing the stone, 121.8 hours, the fair and reasonable rental value was $2,923.20.

The court decided that the plaintiff was entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

The plaintiff claims additional compensation for the time his rock crusher was idle while waiting on the defendant's trucks to remove the stone that had been crushed.

On April 3, 1936, the Procurement Division of the Treasury Department advertised for bids for the furnishing of a rock-crushing plant of not less than 40 cubic yards capacity per hour, with 3-bin, 100-yard bunkers. Bids on two bases were required, one on an hourly basis, the other on a cubic-yard basis. Invitation for bids provided, in part:

> This bid is solicited in advance of allocated funds. Awards will not be made until funds are available.

The plaintiff put in his bids on both bases on April 9, 1936, and was low on both bases. His bid provided:

> In compliance with the above invitation for bids, and subject to all the conditions thereof, the undersigned offers, and agrees, if this bid be accepted within 10 days from the date of the opening, to furnish any or all of the items upon which prices are quoted, * * *.

The bids were opened on April 10, 1936. Plaintiff's bid was not accepted within the ten days specified, but it was accepted on May 26, 1936, 46 days after the bids were opened. After acceptance plaintiff did not communicate with the Procurement Office, but he proceeded to furnish the rock crusher and to crush the rock required. He did this under the following circumstances: Although the contract for the rock crusher was made by the Procurement Division of the Treasury Department, the road work for which the crushed stone was desired was being done under the direction of the Works Progress Administration in the State of Washington near the city of Spokane. Before putting in his bid on April 9, 1936, plaintiff went to the local office of the Works Progress Administration in Spokane to inquire about the work covered by the invitation for bids. He was directed by that office to L. H. Rubicam, who was the Engineer and Project Supervisor in charge of the work. Plaintiff and Rubicam together visited the location of the quarry and the roadway where the crushed rock was to be used. The roadway then had not been sufficiently completed to receive the rock to be crushed, necessitating the use of stock piles, if the crushing was to proceed shortly thereafter. Rubicam also advised plaintiff that the defendant would remove the crushed rock from the bunkers promptly and pile

it in stock piles so that there would be no delay to the plaintiff in the crushing of the rock.

Plaintiff's offer to crush this rock was made on condition that the bid be accepted within 10 days from the opening of the bids, which was on April 10, 1936. It was not accepted within that time and, therefore, plaintiff's offer expired, and defendant's later acceptance of it on May 26, 1936 did not give rise to a contract, unless plaintiff either by word or deed indicated his willingness to perform his original offer. *Restatement of the Law of Contracts*, §§ 40, 61, 73.

As stated above, plaintiff addressed no communication to the Procurement Officer. Neither in one way nor another did he tell him whether or not he was willing to go on with the work notwithstanding the tardy acceptance of his offer; but when his offer was accepted he prepared to go ahead with the work and notified the project engineer of his willingness and intention to do so. This gave rise to a contract.

If there can be any doubt that the contract as originally proposed was finally entered into, that doubt is removed by the subsequent dealings between the parties.

The invitation for bids contained a clause giving the defendant the right to extend the rental period for 60-hour periods, but not beyond June 30, 1936. On this date the plaintiff had been working only about two weeks, and the necessary stone had not been crushed, and the defendant desired to continue the rental. Accordingly, it presented the plaintiff with a paper styled, "Renewal of Contract Number ER–TPS–93–1430 with Max J. Kuney Company." This paper read:

> The undersigned hereby agrees to the renewal of the above contract for a rental period of 3 months from date of expiration on June 30, 1936, at the original rental rate, which is at the rate of fifty-eight (58¢) cents per cubic yard. The estimated number of working months (hrs. or days) required to complete this project is 3 months.
>
> The undersigned further agrees that this contract may be cancelled by the Government by five days' written notice.
>
> Max J. Kuney Company,
> Signed: R. T. McAndrews, Title: *Office Mgr.*
> Address, 124 E. Augusta, Spokane, Wash.

Renewal of the above contract accepted on July 14, 1936, effective upon expiration of the original rental period.

(s) E. M. QUINN,
State Procurement Officer.

This "renewal" was a recognition of the existence of the original contract.

It was a condition of the contract that the defendant would not delay the plaintiff in its performance. This necessarily is to be implied, at least. Also, while Rubicam did not have authority to contract, he did have authority to make binding representations as to the conditions under which the contract was to be performed. His representations made before plaintiff put in his bid, that stock piles were to be used, confirmed the implied condition of the contract that the defendant would not delay plaintiff. When plaintiff's bid had been accepted and he had agreed to go on with the work, there had been no change in plan so far as he had been advised.

After he had expressed his willingness to go on and was preparing to move his rock crusher to the quarry, the road work had progressed to such a point that the defendant decided not to use stock piles, but to remove the rock to the roadbed direct from the bunkers of the rock crusher, and Rubicam orally advised plaintiff of this change in plan. Plaintiff protested against this change on the ground that delay would occur in taking the rock out of the bunkers, which would necessitate the suspension of operations, and that this would increase his expense. Rubicam, however, assured him that he would recommend payment of the increased cost if there were delays and the cost was increased, and plaintiff proceeded with the work. At this time, however, plaintiff had already accepted the contract and this notification by Rubicam of a change in plan did not change the conditions thereof. In the first place, Rubicam had no right to change the terms of the contract, and, in the second place, he did not propose to do so, because he said that if there were delays he would recommend that plaintiff be compensated therefor. He certainly did not mean to impose a new condition, that plaintiff should not be compensated if delays

ensued. Plaintiff entered upon the performance of the contract on the original condition that he would not be delayed in its performance.

There was nothing therein contained about stock piles; the contract did not specify that defendant would remove the rock from the bunkers as soon as crushed, but it is to be implied, as we have stated, that it would not delay the plaintiff in the performance of his contract. Failure to remove the rock when the bunkers were full necessarily stopped the work. The proof shows that 7 times the defendant delayed plaintiff from 4 hours to 10 hours and 10 minutes, 16 times from 2 hours to 4 hours, and 17 times from 1 to 2 hours, 9 times from one-half hour to an hour, and 7 times from 15 minutes to 30 minutes, a total of 121.8 hours. By proper management defendant could have prevented the bunkers from filling up. If this could not have been done otherwise, it could have been done by placing in stock piles the rock they were not ready to place on the road at the time. It was its duty to do this. It did not do so in order to save itself expense,[1] but this put plaintiff to extra and unnecessary expense. For this defendant is liable.

Plaintiff originally offered to rent his crusher for $20.00 per hour, but he now claims $24.00 an hour as the reasonable rental value. He explains this discrepancy by stating that his $20.00 an hour bid did not include fuel and oil, and included but one man to operate the machine, whereas, under his bid that was accepted he was required to furnish fuel, oil, and a complete crew. Plaintiff introduces several credible witnesses to prove that $24.00 was the fair rental value while the machine was idle. Rubicam himself says this was fair. We are of opinion he is entitled to recover at this rate.

That rental value of the equipment is the proper measure of damages in a case such as this one is not open to dispute. See *Steel Products Eng. Co.* v. *United States*, 71 C. Cls. 457, 471; *M. Cain Co., Inc.*, v. *United States*, 79 C. Cls. 290; *Schuler & McDonald, Inc.*, v. *United States*, 85 C. Cls. 631; *Rust Engineering Co.* v. *United States*, 86 C. Cls. 461; *Samuel Plato* v. *United States*, 86 C. Cls. 665.

[1] The proof shows the defendant saved $20,000 by not using stock piles.

It results that the plaintiff is entitled to recover from the defendant the sum of $2,923.20, for which amount judgment will be rendered. It is so ordered.

JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

MADDEN, *Judge*, dissenting:

I do not agree with the foregoing decision and opinion. At the time plaintiff made his contract, by his acceptance of the defendant's counter offer, he had been specifically advised that the crushed rock would be taken directly to the road from the crusher. He knew, and said, that that would entail delays which would increase his expense. He nevertheless moved his equipment to the quarry and began the work. The contract thus made, and later expressly renewed after performance in just this manner had been going on for a period, was a contract to furnish crushed rock to be hauled from the crusher and placed directly on the road. If it were material to the issues, it might be said that there would be implied in the contract an agreement by the defendant that it would use due diligence to remove the stone from the crusher as rapidly as good road-building practice would permit, so as not to put plaintiff to unnecessary delay and loss. But such an implied agreement is not involved here, because there is no finding, and no evidence, or assertion, that the defendant did not use such diligence.

We have then a situation where both plaintiff and the defendant did exactly what they agreed to do, yet plaintiff recovers from the defendant an additional amount for breach of contract. And so the admittedly unauthorized promise of Rubicam to recommend to the persons who were authorized to contract for the government, that plaintiff be paid more than the contract provided, is translated into a judgment.

I would dismiss plaintiff's petition.

JOHN LOMAX v. THE UNITED STATES

[No. 44353. Decided February 2, 1942]

On the Proofs

Pay and allowances; retirement of enlisted man after 30 years' service; demotion after retirement application.—Decided upon the authority of *Blackett* v. *United States*, 81 C. Cls. 884; *Standerson* v. *United States*, 83 C. Cls. 633; *Dene* v. *United States*, 89 C. Cls. 502; *Hornblass* v. *United States*, 93 C. Cls. 148. *LaForge* v. *United States*, 77 C. Cls. 179, distinguished.

The Reporter's statement of the case:

King & King for the plaintiff. *Mr. Fred W. Shields* was on the brief.

Mr. Rawlings Ragland, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. February 25, 1891, the plaintiff enlisted in the United States Army. May 29, 1914, after various reenlistments, plaintiff had credit of more than 30 years of service in the Army, counting foreign service as double time.

2. May 29, 1914, plaintiff held the grade of first sergeant, and on that date made application through his Commanding Officer to the War Department for retirement in the grade of first sergeant. June 8, 1914, after his application for retirement had been forwarded to the War Department, plaintiff was reduced to the grade of sergeant by his Commanding Officer. No cause is shown for this demotion.

3. June 12, 1914, plaintiff's Commanding Officer, by letter, notified the Adjutant General of the United States Army of plaintiff's reduction from the grade of first sergeant to the grade of sergeant and requested that the necessary change in grade be made on plaintiff's application for retirement. This letter was forwarded by the Adjutant General to the Judge Advocate General of the United States Army, who held that if plaintiff was then retired he would have to be retired as a sergeant. August 6, 1914, plaintiff was by order of the Secretary of War placed upon the retired list

in the grade of sergeant, since which time he has received the pay and allowances of a retired sergeant.

4. If it is held that plaintiff is entitled to the retired pay of first sergeant from December 12, 1932 (the petition in this case was filed December 12, 1938), to December 27, 1938, the date on which the motion for call on the General Accounting Office was allowed by this court, the amount due him would be $1,971.43. The claim is a continuing one.

The court decided that the plaintiff was entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

The controversy in this case is whether an enlisted man in the United States Army, who has served thirty years, reached the grade of first sergeant and made application for retirement, can be demoted without cause and retired in the grade of sergeant.

This court has four times held that under the Act of 1907 (in force at the time) this cannot be done, as he had acquired under the statute a vested right of retirement of the grade he had reached when he made his application. See *Blackett* v. *United States*, 81 C. Cls. 884; *Standerson* v. *United States*, 83 C. Cls. 633; *Dene* v. *United States*, 89 C. Cls. 502; *Hornblass* v. *United States*, 93 C. Cls. 148. This ought to settle the question by itself but the defendant seeks to bring a new matter into the case by arguing that this ruling amounts to a repeal of the former statute and that Congress did not intend to repeal it.

So far as the question of repeal is concerned, the amended statute upon which the plaintiff relies (34 Stat. 1217, c. 2515) reads:

> * * * That when an enlisted man shall have served thirty years either in the Army, Navy, or Marine Corps, or in all, he shall, upon making application to the President, be placed upon the retired list, with seventy-five per centum of the pay and allowances he may then be in receipt of, * * *

Section 2 of the same Act provides:

> SEC. 2. That all Acts and parts of Acts, so far as they conflict with the provisions of this Act, are hereby repealed.

The construction we have given to the statute follows its literal language and if it can be said to operate as a repeal in any respect of the law as it theretofore stood, Section 2 provides for it.

Defendant cites the case of *LaForge* v. *United States*, 77 C. Cls. 179. The only question raised and decided in this case was altogether different from the one we have before us. It was contended in that case that the Captain who promoted the plaintiff to first sergeant did not follow a circular of instructions which he had received; and because he had not done so, the power exercised by him in appointing the plaintiff as first sergeant had no validity. In effect, it was contended that the plaintiff was not in fact a first sergeant at the time he was retired, and consequently could not be retired in that grade; but the court held that the Captain under Army regulations had the power to appoint him first sergeant, and that while the disobedience of a circular of administrative routine might bring upon the Captain a discipline of the service it did not invalidate the appointment. The court quoted the certificate of the Secretary of War which showed that the plaintiff was retired as a first sergeant and upon this fact it based its judgment. We think the decision has no application to the case now under consideration.

The argument of defendant seeks to inject an ambiguity by reference to the former statute but as said in the opinion in the *Hornblass* case, *supra*, "a supposed ambiguity may not be injected into such an act by reference to some different language in a prior statute". The whole subject is elaborately discussed in the *Hornblass* case, *supra*, and strong reasons are stated for the construction then given which we now follow.

To the reasons given in the *Hornblass* case, we might add that the construction sought by defendant would in many cases make the grade of retirement depend entirely upon the whim of the soldier's or sailor's superior officer, who could by demoting him without cause or reason lessen the amount of his retirement pay. This would be very unjust to the enlisted man who had faithfully served the time required by Congress and earned by superior service his pro-

motion to the grade in which he was retired. We do not think it reasonable to hold that Congress so intended. In the instant case, no cause is shown for the demotion of the plaintiff and no question arises with reference to the time when he was promoted. He was a first sergeant when retired and presumably in receipt of the pay of that grade.

The claim is a continuing one. The plaintiff is entitled to recover but his petition was not filed until December 12, 1938, which fixes the date from which his recovery will begin at December 12, 1932. Judgment in his favor will be entered upon filing a report from the General Accounting Office showing the amount due the plaintiff from December 12, 1932, to the date of judgment.

LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur. JONES, *Judge*, concurs in the result.

MADDEN, *Judge*, dissenting:

I do not agree with the decision of the Court. I think that the court should return to the interpretation of the applicable statutes which was made in the case of *La Forge* v. *United States*, 77 C. Cls. 179. In that case, the plaintiff was a sergeant at the time he applied for retirement. Before his application was approved, he had been made a first sergeant, which he was when he was actually retired. The court held that his rank at the date of retirement, rather than his rank at the date of application for retirement, determined his pay and allowances after retirement. He was, accordingly, given a judgment for the difference between the retired pay and allowances of a sergeant, which he had been receiving, and those of a first sergeant.

The language of the applicable statutes and their legislative history seem to me to justify that interpretation. I therefore disagree with the conclusions reached in the later cases which seem to have, *sub silentio*, overruled the *La Forge* case. Those later cases are *Blackett* v. *United States*, 81 C. Cls. 884; *Standerson* v. *United States*, 83 C. Cls. 633; *Dene* v. *United States*, 89 C. Cls. 502; *Hornblass* v. *United States*, 93 C. Cls. 148; and the instant case. In

all of them the plaintiff, instead of having been promoted between the date of application for retirement and that of actual retirement, had been demoted, but that is surely a circumstance immaterial to the question of statutory construction.

The Act of February 14, 1885 (23 Stat. 305), as amended by the Act of September 30, 1890 (26 Stat. 504, U. S. Code Tit. 10, sec. 947a), provides in part as follows:

> That when an enlisted man has served as such thirty years in the United States Army or Marine Corps, either as private or non-commissioned officer, or both, he shall by application to the President be placed on the retired list hereby created, with the rank held by him at the date of retirement, and he shall thereafter receive seventy-five per centum of the pay and allowances of the rank upon which he was retired, * * *.

The Act of March 2, 1907 (34 Stat. 1217, U. S. Code Tit. 10, sec. 980), provides as follows:

> That when an enlisted man shall have served thirty years either in the Army, Navy, or Marine Corps, or in all, he shall, upon making application to the President, be placed upon the retired list, with seventy-five per centum of the pay and allowances he may then be in receipt of, and that said allowances shall be as follows: Nine dollars and fifty cents per month in lieu of rations and clothing and six dollars and twenty-five cents per month in lieu of quarters, fuel, and light: *Provided*, That in computing the necessary thirty years' time all service in the Army, Navy, and Marine Corps shall be credited.
>
> SEC. 2. That all Acts and parts of Acts, so far as they conflict with the provisions of this Act, are hereby repealed.

Both acts were quoted in the *La Forge* case, and then the Act of 1890 was particularly applied to a soldier who applied for retirement in November 1914, and was retired in December of that year, having been promoted in the meantime.

The Act of 1907 does not expressly repeal the Act of 1890. It contains only a clause of general repeal of all acts or parts of acts inconsistent with the later legislation.

By its quotation and application of the 1890 Act in the *La Forge* case, the court apparently concluded that that Act was not inconsistent with the 1907 Act on the point at issue, and that either the 1907 Act had the same meaning as the 1890 Act with regard to the date as of which retirement pay and allowances would be computed, or that the 1890 Act was still in effect and applicable. I think the former view is probably correct and that the 1890 Act was *pro tanto* superseded by the 1907 Act. But the point is an immaterial one if the two Acts have the same meaning in this regard.

It is true that the language of the 1907 Act is less clear as to the date as of which the retirement allowance is to be fixed than that of the 1890 Act. Nevertheless, I think that Congress intended the same date in both acts. My reasons for thinking so are as follows.

(1) This is the more natural meaning of the language. The 1907 Act says "* * * when an enlisted man shall have served thirty years, * * *, he shall, upon making application to the President, be placed upon the retired list, with seventy-five per centum of the pay and allowances he may then be in receipt of, * * *". The reference of the word "then" to the event which immediately precedes it in the sentence, viz, his being placed upon the retired list, would be in keeping with the ordinary use of our language. If the reference is not made to the immediately preceding event, the date of retirement, a further ambiguity is introduced because there are two other events mentioned earlier in the sentence, viz, the soldier's having completed thirty years' service and his making application for retirement, either of which could, with some logic, be selected as the event referred to.

(2) I think it is attributing an unnatural intention to Congress to suppose that it intends that one who is in fact, at the date of his retirement, a first sergeant by reason of an intervening promotion, or a private by reason of an intervening demotion, should have the rank and allowances of something he is not, viz, a sergeant. The department which is responsible for evaluating his services has given him a certain rank in the army, and it is hard to imagine

a reason why Congress should wish to place him in a higher or lower rank, as a retired soldier. I think such an intention on the part of Congress would be so unusual that we might expect the statutory language to express it with clarity.

(3) We know, to a practical certainty, what Congress meant by the 1907 Act. Senate Bill 3638 became, without amendment, the Act of March 2, 1907. The report of the Committee on Military Affairs to the Senate[1] merely recommended that the bill pass, and invited attention to a memorandum, quoted verbatim in the report, from the Chief of Staff of the Army to the Secretary of War, transmitted by the Secretary with his approval to the Senate. The memorandum contains the following language:

> So far as the Army is concerned, the bill makes the following changes in existing laws:
> 1. It allows enlisted men to count service in the Navy in time of peace for purposes of retirement.
> 2. It authorizes an allowance of $6.25 per month in lieu of quarters, fuel, and light furnished men on the active list.

In the House of Representatives, Congressman Hull reported S. 3638 and asked unanimous consent for its consideration. The following discussion is all that is pertinent.[2]

> Mr. WILLIAMS. Mr. Speaker, I would like to ask the gentleman in charge of the bill to whom the bill applies—to what rank?
> Mr. HULL. It applies to none above the rank of enlisted men of the Army, Navy, and Marine Corps. It changes the law by allowing those who have served thirty years in the Army, Navy, or Marine Corps and who are on the retired list $6.25 a month additional pay. That is all there is in the bill.
> Mr. MANN. That is the only change?
> Mr. HULL. There is no other change in the law. It simply gives the man who serves his country thirty years in the enlisted forces of the Army, Navy, or Marine Corps $6.25 a month.

[1] Senate Report No. 1791, 59th Cong., 1st Sess.
[2] Cong. Record, Vol. 41, Part 4, p. 3943.

This evidence of Congressional intent seems to me to show beyond question that the proponents of this legislation had no doubt that the Act of 1907 meant, in regard to the point in question, just what the Act of 1890 had meant. Whether it repealed the Act of 1890 by changes in the two particulars intended, or merely duplicated parts of it which were not inconsistent, leaving both acts in effect, is as I have said, not material here.

With this evidence of what those who framed the statute actually meant, a court having the responsibility of construing the statute would be justified in stretching the language actually used to considerable length to give it that meaning and thus carry out the intent of Congress. Here no stretching is necessary. The normal meaning of the words as arranged in the sentence, the natural intention of those who might use such words, and the actual intention of those who did use the words, all seem to me to coincide.

I think, therefore, that plaintiff, being a sergeant when he was retired, and having received the retired pay of a sergeant, is not entitled to more.

JOHN D. FICKLEN v. THE UNITED STATES

[No. 44391. Decided February 2 ,1942]

On the Proofs

Pay and allowances; officer in Air Corps Reserve, U. S. A., with dependent mother.—Where it is shown by the evidence that plaintiff, an officer in the Air Corps Reserve, United States Army, on active duty as Captain, detailed to duty with the Civilian Conservation Corps, was not furnished quarters adequate for himself and his dependent mother, or adequate quarters for an officer of his rank without a dependent; it is *held* that plaintiff is entitled to recover the full amount granted by law, without deductions.

Same.—The evidence adduced establishes that plaintiff's mother was in fact dependent upon him for her chief support within the meaning of the applicable statutes.

The Reporter's statement of the case:

Mr. Fred W. Shields for the plaintiff. *Messrs. King & King* were on the brief.

Miss Stella Akin, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Elihu Schott* was on the brief.

Plaintiff, a bachelor officer of the Air Corps Reserve, U. S. Army, sues to recover rental and subsistence allowances authorized by law for an officer of his rank having a dependent mother for the periods from October 8, 1933, to October 7, 1934, and from December 4, 1934, to March 25, 1938, during which periods he was on active duty with the U. S. Army under assignment to the Civilian Conservation Corps' activities.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff is an officer in the Air Corps Reserve, United States Army, and has served on active duty, as a captain, detailed to duty with the Civilian Conservation Corps from October 8, 1933, to October 7, 1934, and from December 14, 1934, to June 14, 1938.

The plaintiff was a bachelor officer until March 25, 1938, on which date this claim terminates.

2. Plaintiff's mother, Mrs. Mary Lyon Ficklen, was born in 1867. Her husband, plaintiff's father, died in 1894, leaving her 160 acres of land located near Pueblo, Colorado, and $4,000 in insurance. Out of the insurance she paid the funeral expenses and other obligations amounting to $1,000, leaving her a balance of $3,000. The plaintiff is the only child.

3. Plaintiff's mother was not gainfully employed during the periods covered by this claim, and on account of her advanced age did not have employment of any kind. Plaintiff's mother during the periods of this claim did not own any income-producing personal property, but she did own the following real property:

(1) A ¼ interest in 12 houses located at Fulton and Glenwood Streets, Atlanta, Georgia. These houses were rented to Negro tenants. Her interest in this property was subject to a mortgage of $2,000, bearing interest at 6 percent per annum. The value of her interest in this property was	$2,000.00
(2) An entire interest in a house located at 93 Hilliard Street, Atlanta, Georgia, valued at	1,200.00
(3) A ½ interest in a house located at 413 Whitehall Terrace, Atlanta, Georgia, which was rented to Negro tenants. Her interest in this property, together with the property described in the preceding paragraph (2), was subject to a mortage of $1,150, bearing interest at 8 percent per annum. Her interest in this property was valued at	600.00
(4) A ½ interest in a cottage located on Willow Street, Atlanta, Georgia, which she jointly owned with a sister. Her interest in this property was subject to a mortgage of $750, bearing 6 percent interest per annum. Her interest in this property was valued at	900.00
(5) An entire interest in a vacant lot located on Howell Mill Road, Atlanta, Georgia, valued at	280.00
(6) A ⅙ interest in a vacant lot located at 90 East Cain Street, Atlanta, Georgia, her interest valued at	758.33
(7) A ⅛ interest in a vacant lot located at Hornaday and Jefferson Streets, Atlanta, Georgia, her interest valued at	25.00
(8) A ⅙ interest in a house located at 2114 Howell Mill Road, Atlanta, Georgia. The house was occupied as a home by plaintiff's mother and her two sisters. Plaintiff's mother's interest was valued at	500.00
(9) An entire interest in tracts of land in Fulton County, Georgia, a few miles from Atlanta, consisting of 35.6 acres valued at	5,100.00
(10) An undivided ⅙ interest in 39.7 acres of land in Fulton County, Georgia, a few miles from Atlanta, her interest valued at	960.00
(11) An entire interest in 160 acres of land located near Pueblo, Colorado, valued at	240.00
Total interest of plaintiff's mother	12,563.33

4. The mortgages against the mother's interest in the foregoing parcels of land amounted to $3,900.

The mother also owned an entire interest in a vacant lot on Wesley Avenue, near Atlanta, which was sold about the

time of the termination of the second period for $4,000. After payment of the mortgage of $2,000 and accrued interest, and costs of sale, the balance of $600 was used to defray medical and hospital expenses due to a severe injury suffered by the mother.

The mother had to borrow money from the banks from time to time, on her personal notes endorsed by plaintiff, to pay pressing obligations, such as taxes, etc. These loans were in amounts from $250 to $750.

The interests in the properties owned by plaintiff's mother, aside from the 160 acres in Colorado, were acquired by her years before the period in controversy, through inheritance from her mother and a brother, and by purchases with insurance money she received at the time of the death of plaintiff's father.

During the periods in controversy none of the real property described in the preceding finding could have been sold advantageously and without incurring unnecessary financial sacrifices.

5. The real property owned by the mother formerly yielded a satisfactory income. Since the beginning of the depression great difficulty has been experienced both in renting the property and in collecting the rents. The mother's property was under the general management of the plaintiff. During the years 1933, 1934, and 1935, the amounts expended for upkeep and repairs, taxes, and interest, exceeded the income from rents between $100 and $150 annually. For the years 1936, 1937, and 1938, the income exceeded the costs by $50 or less each year.

6. During the periods covered by this claim plaintiff's mother lived with two of her sisters in a house at 2114 Howell Mill Road, Atlanta, Georgia. She paid about one-third of the general household expenses. The mother lived economically and her total average monthly living expenses were about $60 or $70 a month.

7. The plaintiff made regular contributions to the support of his mother prior to 1933, and since October 8, 1933, has contributed at least $100 a month to her, which contributions were her sole source of income except for the small income she at times received from her property, as heretofore stated.

8. During the periods from October 8, 1933, to October 7, 1934, and from December 14, 1934, to March 25, 1938, the plaintiff while assigned to and performing active duty was not paid the rental and subsistence allowances of an officer with dependents.

In the Comptroller General's reply, which is plaintiff's Exhibit No. 2 and made a part hereof by reference, he states:

> In reply to plaintiff's request in the above entitled cause as allowed by the court December 28, 1938, you are informed that if the court should hold that plaintiff's mother was dependent upon him for her chief support during the periods of plaintiff's active duty in the years from 1933 to 1938, inclusive, there will be due him $3,926.34, computed as follows: * * *

In the Comptroller's reply it appears that the computation was made on the basis that the plaintiff received no rental and subsistence allowances and that he occupied no officers' quarters during the time in controversy. How the plaintiff was quartered during the periods of this claim is set out in the next finding.

9. During the periods from October 8, 1933, to October 7, 1934, and from December 14, 1934, to March 25, 1938, the plaintiff, while assigned to and serving on active duty with the Civilian Conservation Corps, occupied the following kinds or types of quarters:

(1) During the period from October 8, 1933, to October 7, 1934, he, during the first two months of the period, occupied quarters consisting of canvas shelter furnished by the defendant; thereafter he and other officers stationed at the camp constructed at their own personal expense two one-room wooden buildings, one of which was thereafter occupied by plaintiff and another officer. The construction of the two rooms involved a cost of approximately $128, of which plaintiff contributed approximately $35, the balance being contributed by various other officers stationed at the camp. The room occupied by plaintiff was heated by an oil heater which plaintiff purchased at a cost of $32.50. The heater remained the personal property of the plaintiff but the cost of the fuel for the heater, amounting to approximately $7 a month for a period of about five months, was shared jointly by the plaintiff and the officer occupying the room with him.

Some time after the construction of the two buildings referred to above such improvements as new roofing, the cutting of additional doors and windows, and the addition of a toilet and bath for general use were made in the buildings, the cost of which was paid by the defendant.

(2) During the period from December 14, 1934, to March 25, 1938, plaintiff was furnished by defendant, and occupied as quarters in the various camps at which he was stationed, a single room about ten by twelve feet in size. He occupied the room alone, but the toilet and bathing facilities for general use were shared with other officer personnel (usually three officers and an educational advisor) stationed at the camp.

(3) At no time during the period of the claim were adequate quarters as provided by law furnished for plaintiff and his dependent, and such adequate government quarters were not available. The shelter and room occupied by plaintiff did not constitute adequate quarters provided by law for an officer of his rank with or without a dependent. There was no determination by competent superior authority of the service concerned that a lesser number of rooms than the number of rooms provided by law would be adequate for the occupancy of plaintiff and his dependent mother.

10. During the period of the claim involved, plaintiff's mother was in fact dependent upon him for her chief support.

The court decided that the plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The first question in this case is whether plaintiff's mother was in fact dependent upon him for her chief support within the meaning of section 4 of the Act of June 10, 1922, 42 Stat. 625, as amended by the Act of May 31, 1924, 43 Stat. 250. This issue arises by reason of renewal by counsel for defendant of the contention made and overruled in prior cases that if defendant's mother had pursued a different business policy in connection with the property she owned, or in which she had an interest, by selling certain properties and making expensive repairs to or remodeling other property in which

she only had an undivided interest she might have been able to derive a monthly income which, if she had been able to collect, would have been sufficient to take care of most, if not all, of her reasonable and necessary living expenses. The properties which plaintiff's mother owned, or in which she had an interest, and the value thereof are described and set forth in findings 3 to 6, inclusive.

The proof shows that prior to the depression and the economical conditions existing thereafter, insofar as they affected property of the type described, the properties yielded an income which was sufficient for the support of plaintiff's mother, but that in recent years and during the periods of the claim here involved great difficulty was experienced both in renting the property and in collecting rents. The proof further shows that none of the real property in which plaintiff's mother had an interest could have been sold advantageously without incurring financial sacrifices. Moreover, plaintiff's mother only owned an undivided interest in most of the real property; and the defendant's contention, in connection with which it introduced some testimony that if plaintiff's mother or the plaintiff, who looked after the interests of his mother, had pursued a different business policy in selling some of the properties and in remodeling, repairing, and improving the others, such policy would have produced the asserted theoretical results, does not carry much force.

The proof does not show and there is no contention that the properties in which plaintiff's mother had an interest were deliberately handled by the mother, or by plaintiff as her representative, in such a way as to show her dependency upon plaintiff for her chief support. They did the best they could with the properties as they were handled and managed. The statute does not require that the officer's mother exercise the highest degree of skill in handling or administering her property interests, and the court will not inquire into the matter. Nor will the court, in determining the fact as to whether, during the periods involved, the mother was dependent upon her son for her chief support, base its decision of this fact upon what some real-estate dealer might think he could have done with the property as a whole in the way of increas-

ing the income therefrom by decreasing the property and investing the proceeds in improvement of the balance. This would be only conjectural and no comparable instance where such a policy was successfully carried out is proven. *Tomlinson* v. *United States*, 66 C. Cls. 697; *Bradley* v. *United States*, 74 C. Cls. 521; *Freeland* v. *United States*, 74 C. Cls. 471, 476, 477; *Updegraff* v. *United States*, 75 C. Cls. 508, 532.

The proof shows that during the years 1933 to 1935, inclusive, the total income received from the property interests of plaintiff's mother was from $100 to $150 a year less than the amounts expended and necessary to be expended thereon for upkeep, repairs, taxes, and interest, and that during the years 1936 to 1938, inclusive, the net income received by plaintiff's mother from her interests in the properties was $50 or less a year.

Prior to 1933 plaintiff made regular contributions to his mother which constituted her chief support and since October 8, 1933, the beginning of the periods involved in this suit, plaintiff has regularly contributed at least $100 a month to his mother for her support, which contributions were her sole source of income, except for the small income she at times received during the years 1936, 1937, and 1938 from her property interests as above stated. It is clear from the facts and circumstances described by the record that she was in fact dependent upon plaintiff for her chief support within the meaning of the applicable statutes.

The next question is whether plaintiff is entitled to recover the full statutory allowance authorized by law for an officer of his rank in lieu of government quarters adequate for himself and his dependent mother. No adequate government quarters for himself and his mother were furnished or were available. But defendant contends that since the plaintiff while assigned to active duty with the Civilian Conservation Corps occupied quarters of the sort described in finding 9 there should for that reason be deducted from the fixed statutory allowance in lieu of quarters for an officer of plaintiff's rank with a dependent the amount of $981.93 less $85 expended by plaintiff in connection with the shelter occupied by him as set forth in finding 9 (1) and judgment entered in his favor for only $3,029.41 if it is found that his mother was

dependent upon him for her chief support during the periods involved.

The record shows that plaintiff was not furnished quarters adequate for himself and his dependent mother, or adequate quarters for an officer of his rank without a dependent, and that the total of the statutory allowances in lieu of such quarters during the periods of the claim is $3,926.34. (See finding 9.) We are of opinion that plaintiff is therefore entitled to recover this amount in full without any deduction.

Judgment will therefore be entered in favor of plaintiff for $3,926.34. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* and WHITAKER, *Judge,* concur.

WHALEY, *Chief Justice,* concurring:

I concur in the result reached by the majority opinion. The findings show that at no time during the period involved did the plaintiff receive from the Government facilities that could be called quarters in any proper sense, even for himself alone. Part of the time he supplied the room he occupied, and at best his room was in general use by other officer personnel, four in number. Plaintiff was consequently deprived of the allowance to which he was entitled and should be reimbursed therefor in the full amount granted him by the law.

JOSEPHINE V. HALL v. THE UNITED STATES

[No. 44924. Decided February 2, 1942] *

On the Proofs

Income tax; depreciation; amortization; recoupment.—Where under the will of decedent, the trustees of the estate, of which plaintiff was a beneficiary, and which consisted of leaseholds and other property, distributed to the beneficiaries, including plaintiff, the net income without deduction for depreciation, obsolescence, or amortization; and where in 1932 the trustees, in accordance with a trust provision conferring such discretion, sold said leaseholds and distributed to the then beneficiaries

* Certiorari denied April 6, 1942.

the entire assets, including undistributed income and authority to receive future payments on the sale of said leaseholds; and where in computing for tax purposes the profits from said sale in 1932 the Commissioner of Internal Revenue reduced the 1913 basis of value by the amount of the depreciation on the buildings and amortization of the leases from March 1, 1913, to the date of sale; and where depreciation and amortization had not been allowed in assessing income taxes for the years prior to 1929; it is *held* that under the provisions of the Revenue Acts of 1928 and 1932 such deductions were properly considered in computing gains on the sale made in 1932 and the Commissioner properly so held.

Same.—It is *held* that plaintiff is not entitled, under the common law doctrine of recoupment, to recoup alleged overpayment of income taxes for the years prior to 1929, during which depreciation was not allowed, against income taxes for the years 1932 to 1935, inclusive, during which depreciation on the property for the years prior to 1929 was considered in fixing the basis of value on the leasehold property which was held in 1932. *Bull, Executor*, v. *United States*, 295 U. S. 247, distinguished.

Same.—Where plaintiff did not at any time file a claim for refund of alleged overpayment of taxes for the years prior to 1929, and where plaintiff under the statutes had the privilege of filing such claim and in case of rejection to file timely suit therefor; and where if plaintiff had the right to an allowance for depreciation in said years such right could have been established; it is *held* that under sections 608 and 609 of the Revenue Act of 1928 plaintiff is not entitled to recover by way of recoupment.

Same.—If the right to a refund could not have been established under the statutes in effect prior to 1929, plaintiff cannot properly claim recoupment later.

Same.—Limitation statutes are enacted for the benefit of the taxpayer as well as the Government.

The Reporter's statement of the case:

Mr. Robert Ash for the plaintiff. *Messrs. Mitchell & Van Winkle* were on the briefs.

Mr. John A. Rees, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Plaintiff is a citizen of the United States and a resident of New York City.

2. Thomas R. A. Hall, a resident of New York City, died testate February 10, 1910. He was survived by his widow and three children, William W. Hall, Lillian Hall Abbett, and Josephine V. Hall, plaintiff herein. His last will and testament dated October 22, 1909, was duly admitted to probate by the Surrogate of New York County and letters testamentary thereunder issued to William W. Hall, his son, and William H. Hall and Charles E. Hall, his brothers, named in the will as his executors and trustees. After the death of William H. Hall, William W. Hall, and Charles E. Hall continued as sole surviving executors and trustees.

By the seventh paragraph of his will, the testator gave his entire residuary estate in trust to his executors in the following language:

> In special trust and confidence, however, that they will take possession, manage and control the same, and invest and reinvest the same from time to time as they may deem best for the interest of said estate, and that they will hold and manage the same, and pay over the net income, as often as may be convenient, to the beneficiaries as follows: In case my wife survives me they shall hold one-third of said estate for the benefit of my said wife for and during her natural life; and they shall hold and manage the remaining two-thirds of my estate or, in case my wife shall not survive me, then the whole of said estate, in trust for the benefit of my three children, William W. Hall, Lillian Hall Abbett and Josephine V. Hall, in equal shares and proportions for and during their respective lives, and that in case my wife survives me, then after her death, they hold the one-third in which she is interested for life, for the benefit of my said three children in equal parts or shares. These provisions are subject to the right on the part of my executors to advance any part or parts of the principal sum to any of the beneficiaries whenever and as often as they deem proper to do so, and I give them full power and discretion to make such advances to the several beneficiaries out of the principal of the shares set apart for their benefit as hereinbefore provided.

The trustees under the will of Thomas R. A. Hall, deceased, were the owners on March 1, 1913, of two leaseholds known as No. 634 and No. 636 Fifth Avenue, New York City. The terms of both leases expired May 1, 1938.

The testator's widow died prior to 1932. Before her death the trustees distributed one-third of the net income (without deduction for depreciation, obsolescence, or amortization) to the widow and two-thirds to the three children. After the death of the widow the annual net income (without deduction for depreciation, obsolescence, or amortization) was distributed by the trustees equally to the three children, all of whom were adults.

3. The two leaseholds mentioned in the preceding finding, together with certain other property, constituted all the corpus of the residuary trust created by the will of Thomas R. A. Hall. The trustees under that will were the owners of those leaseholds on March 1, 1913, and until June 8, 1932, when (having first secured the consent of the three beneficiaries, William W. Hall, Lillian Hall Abbett, and Josephine V. Hall, the plaintiff herein) they executed a contract of sale thereof to the trustees of Columbia University for the sum of $1,017,750.00 payable in equal monthly installments over a period of sixty-nine months ending April 16, 1938. The agreed monthly payments were not secured by any lien.

Thereafter on June 17, 1932, the trustees executed a written declaration reading in part as follows:

> NOW, THEREFORE, pursuant to the power and discretion vested in said executors, as aforesaid, one-third of the net sum so to be received for the sale of said leases and leaseholds is hereby set apart for each of the three said beneficiaries, and the payment of such one-third direct to each of said beneficiaries is hereby authorized to be made.

This declaration was executed by the trustees pursuant to power and authority vested in them by the will of Thomas R. A. Hall as interpreted by the Surrogates Court of the County of New York in opinions that were affirmed by the Appellate Division and had become final, rendered in two separate proceedings brought to secure a decree requiring the trustees to withhold a portion of the net income from the leaseholds as a fund against the ultimate destruction of the capital of the trust. On both occasions the Court held the life tenants entitled to the entire income from the

trust, refused to require or permit the setting up of a fund out of income for amortization or depreciation and decreed that the whole of the net income must be distributed. It also held that the trustees had the power, within their discretion, to pay out all or any portion of the principal of the trust fund at any time they saw fit.

In October 1933, pursuant to authority and with the express approval of the Surrogates Court, the trustees terminated the trust and distributed all assets then on hand, including undistributed income, to the life tenants and beneficiaries, William W. Hall, Lillian Hall Abbett, and Josephine V. Hall. In connection with that distribution each of the three beneficiaries executed a receipt which, in so far as the sales contract with Columbia University is concerned, read in part as follows:

> NOW, THEREFORE, I, JOSEPHINE V. HALL, the undersigned, one of the three residuary legatees of the said estate, do hereby acknowledge receipt from the said Trustees of the following cash and securities in full settlement of my distributive share of said estate:
>
> * * * * *
>
> A one-third interest in a contract dated June 8, 1932, between * * * surviving Trustees * * * and The Trustees of Columbia University * * * under which contract * * * there remains to be paid $753,500.06 in monthly installments * * * commencing with October 1933 * * *.

4. Prior to the enactment of Section 23 (k) of the Revenue Act of 1928, the Commissioner of Internal Revenue did not allow the beneficiaries (including plaintiff) to deduct from income received any allowance for exhaustion, wear, tear, obsolescence, amortization, or depreciation, nor did he allow the trustees any like deduction because they had not actually withheld any income and had not set up any reserve.

5. In computing taxable profit upon the sale of the leaseholds referred to in finding 3, the Commissioner reduced the basis for computing gain or loss by depreciation on the buildings and amortization of the leases from March 1, 1913, to the date of sale and valued the future installment

payments at $662,350.00 instead of face value. The March 1, 1913, value of the buildings and leaseholds as used by the Commissioner, the depreciation and amortization computed thereon, and the residual value found by him for the purpose of determining the gain realized on the sale were as follows:

	March 1, 1913, value	Depreciation	Residual value
Building at 634 Fifth Avenue	$151, 331. 00	[1] $58, 766. 88	$92, 564. 12
Building at 636 Fifth Avenue	543, 000. 00	[1] 210, 865. 00	332. 135. 00
Lease	421, 794. 00	[2] 325, 423. 92	96, 370. 08
	1, 116, 125. 00	595, 055. 80	521, 069. 20

[1] This depreciation was calculated at the rate of 2% for the period March 1, 1913, to the date of sale.
[2] This figure represents amortization over the same period.

6. On the basis of the computation referred to in the preceding finding, the Commissioner computed capital gain to plaintiff for the years 1932, 1933, 1934, and 1935 in the respective amounts of $16,700.97, $73,248.30, $2,250.33, and $5,225.00, and as a result of that computation the Commissioner determined additional taxes against plaintiff which were timely assessed by the Commissioner and paid by plaintiff as follows:

Year	Tax	Interest	Date assessed	Date paid	Total
1932	$1, 539. 70	$378. 49	June 11, 1937	June 30, 1937	$1, 918. 19
1933	8, 460. 30	1, 572. 10	June 11, 1937	June 30, 1937	10, 032. 40
1934	57. 72	10. 88	May 6, 1938	May 20, 1938	68. 60
1935	800. 54	102. 83	May 6, 1938	May 20, 1938	903. 37
	10, 858. 26	2, 064. 30			12, 922. 56

7. On July 24, 1937, plaintiff filed formal claims for refund for 1932 and 1933 in the respective amounts of $1,539.70 and $8,460.30 and on March 2, 1939, plaintiff filed similar claims for the years 1934 and 1935 in the respective amounts of $57.72 and $800.54. All these claims set forth the ground that, as the plaintiff had been refused a depreciation deduction for all years prior to 1929, she was entitled to recoupment for 1932, 1933, 1934, and 1935 under the authority of *Bull* v. *United States*, 295 U. S. 247, because depreciation and amortization for years prior to 1929 had been

used to reduce the basis in computing 1932, 1933, 1934, and 1935 gain although no deductions therefor had been allowed in computing income for years prior to 1929.

8. Plaintiff filed individual Federal income tax returns for the calendar years 1919 to 1928, inclusive, reporting taxable income and taxes due as hereinafter set forth. The taxes so reported were based in part upon income which included income received from the estate of Thomas R. A. Hall as follows:

Year:	*Amount*	Year:	*Amount*
1919	$16, 346. 20	1924	$33, 766. 66
1920	15, 908. 59	1925	22, 500. 00
1921	20, 603. 02	1926	34, 342. 97
1922	19, 867. 72	1927	40, 485. 57
1923	26, 190. 21	1928	37, 611. 79

9. The taxes shown due in the returns filed for the years 1919 to 1928, inclusive, and referred to in the preceding finding were paid by plaintiff as follows:

Year	Date	Payment	Total tax	Year	Date	Payment	Total tax
1919	3/19/20	$1, 548. 33	$1, 548. 33	1925	3/10/26	$256. 28	
1920	3/19/21	1, 610. 79	1, 610. 79		6/16/26	256. 28	
1921	3/15/22	1, 056. 72			9/15/26	256. 28	
	7/25/22	1, 056. 72	2, 113. 44		12/16/26	256. 28	1, 025. 12
1922	3/14/23	856. 22		1926	3/23/27	1, 368. 90	
	9/ 6/23	856. 21	1, 712. 43		6/ 9/27	1, 368. 90	2, 737. 80
1923	3/15/24	707. 01		1927	3/20/28	1, 114. 18	
	6/17/24	353. 51			6/19/28	1, 114. 18	
	8/11/24	707. 01			9/14/28	1, 828. 35	4, 056. 71
	9/30/24	530. 26					
	12/31/24	530. 26	2, 828. 05				
1924	3/16/25	694. 45		1928	3/16/29	1, 027. 67	
	7/1 /25	694. 45			6/15/29	1, 027. 67	
	9/23/25	694. 45			9/14/29	1, 027. 66	
	12/14/25	694. 45	2, 777. 80		12/16/29	1, 027. 66	4, 110. 66

Of the tax paid for the year 1920, there was later refunded to plaintiff the sum of $100.90, together with interest thereon of $22.02; and for the year 1921 there was similarly refunded the sum of $765.99 together with interest thereon of $105.17. Upon an audit of plaintiff's return for 1925, the Commissioner assessed an additional tax of $24.72 plus interest of $2.52 which plaintiff paid January 20, 1928.

10. The refund claims filed for the years 1932 and 1933 were disallowed on a schedule dated December 14, 1937, and plaintiff was so advised by registered mail in a letter of the same date. The claims for refund for 1934 and 1935

were similarly disallowed on schedules dated November 20 and October 20, 1939, respectively, and plaintiff likewise was advised thereof by registered letters on the same dates.

The court decided that the plaintiff was not entitled to recover.

JONES, *Judge*, delivered the opinion of the court:

Thomas R. A. Hall died February 10, 1910. His estate consisted of two leaseholds of valuable New York property and certain other holdings. His will left the entire estate in trust for his widow, two sons and one daughter, the latter being plaintiff in this case. The widow was to have the income of one-third of the property during her lifetime. The other beneficiaries were to share equally the remaining two-thirds of the income and in the event of the widow's death the entire income, and finally in the distribution of the residuary estate.

The terms of the two leases expired May 1, 1938.

On June 8, 1932, the trustees, with the consent of the beneficiaries, sold the leaseholds to the trustees of Columbia University for $1,017,750.00, payable in 69 equal monthly installments, ending April 16, 1938.

Until the widow's death, which occurred prior to 1932, the trustees distributed the net income (without deduction for depreciation, obsolescence, or amortization) to the beneficiaries as indicated; and after the death of the widow the entire net income to the three children in the same manner. In assessing income taxes for the years prior to 1929 the Commissioner of Internal Revenue did not permit plaintiff and other beneficiaries to deduct from income received any allowances for depreciation and amortization. After the enactment of section 23 (k) of the act of 1928, which made specific provision for depreciation applicable to leaseholds as well as other property, the Commissioner of Internal Revenue allowed such depreciation for the year 1929 and following years.

After the sale of the trust property to Columbia University, the trustees, in accordance with a trust provision giving them that discretion, distributed the entire assets, including undistributed income and authority to receive

future payments, to the three children, all of whom were adults.

The Commissioner of Internal Revenue, in computing for tax purposes the profits from the sale in 1932 reduced the 1913 basis of value by the amount of the depreciation on the buildings and amortization of the leases from March 1, 1913, to the date of sale. The effect of this action was to increase for tax purposes the amount of the gain under the sale.

Plaintiff filed timely claims for refunds of taxes for the respective years 1932 to 1935 inclusive, on the ground that since depreciation deduction had not been allowed in the assessment of income taxes for the years prior to 1929 she was entitled to recoupment to be applied on the taxes for the years 1932–1935.

Questions: Did the Commissioner of Internal Revenue act correctly in reducing for tax purposes the basis of value of the property sold by considering depreciation, obsolescence, and amortization for the years prior to 1929?

Should the Commissioner of Internal Revenue have reduced plaintiff's taxes for the years 1932 to 1935, inclusive, by permitting recoupment, offset, or statutory credit in the amount of the alleged overpayment for the years prior to 1929? Since he did not do so may she now recover such amounts?

Plaintiff's first contention is predicated upon the claim that the taxes levied and collected for the years 1932 to 1935 were excessive on account of the fact that the basis for determining gain on the sale made in 1932 was improperly reduced by depreciation and amortization neither allowed nor allowable for the years prior to 1929.

While depreciation and amortization had not been allowed in collecting income taxes for the years prior to 1929, we think that by the terms of the Revenue Acts of 1928 and 1932 such deductions were properly considered in computing gains on the sale made in 1932, and that the Commissioner properly so held.[1]

[1] *Burnet, Commissioner,* v. *Thompson Oil & Gas Co.,* 283 U. S. 301, 308; *Huber* v. *United States,* 83 C. Cls. 643, 647; *Chisolm* v. *United States,* 85 C. Cls. 199.

The second question presents greater difficulties.

Plaintiff contends that under the common law doctrine of recoupment invoked in the case of *Bull, Executor*, v. *United States*, 295 U. S. 247, 261, and in *Stone et al., Trustees*, v. *White*, 301 U. S. 532, 539, she is entitled to recoup alleged overpayment of income taxes for the years prior to 1929, during which depreciation was not allowed, against income taxes for the years 1932 to 1935, inclusive, during which depreciation on the property for the years prior to 1929 was considered in fixing the basis of value on the leasehold property which was sold in 1932.

The defendant contends that under the doctrine laid down in *McEachern, Administrator*, v. *Rose*, 302 U. S. 56, 59, the statute of limitations prevents such recoupment, offset, or statutory credit.

We do not think the principles set out in *Bull* v. *United States*, *supra*, are applicable to the case at bar. In the *Bull* case the identical sum of money was involved, growing out of the same transaction. Two men operating as partners had had an agreement that in the event of the death of either, the legal representatives of such deceased partner should have the option of participating in the income of the partnership for one year after such death. One of the partners died February 13, 1920. Prior to his death his part of the profits had been $24,000.00 for the year 1920. After his death, his portion of the profits was $212,000.00 for the remaining part of the year.

The Collector treated the $212,000.00 as a part of the estate and collected an estate tax thereon. Thereafter in July 1925 the Collector determined that the $212,000.00 returned in 1920 should have been treated as income instead. He accordingly assessed a deficiency income tax of $55,000.00 plus interest for the year 1920 which was paid. Claim for refund was filed and rejected, and suit was filed for refund.

The court held that the $212,000.00 was properly treated as income, but permitted recoupment of the estate tax erroneously paid, notwithstanding limitation statutes. We quote:

> In July 1925 the Government brought a new proceeding arising out of the same transaction involved in the earlier proceeding. This time, however, its claim

> was for income tax. The taxpayer opposed payment in full, by demanding recoupment of the amount mistakenly collected as estate tax and wrongfully retained. Had the Government instituted an action at law, the defense would have been good. The United States, we have held, cannot, as against the claim of an innocent party, hold his money which has gone into its treasury by means of the fraud of its agent. *United States* v. *State Bank*, 96 U. S. 30. While here the money was taken through mistake without any element of fraud, the unjust retention is immoral and amounts in law to a fraud on the taxpayer's rights. What was said in the *State Bank* case applies with equal force to this situation. "An action will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund. The form of the indebtedness or the mode in which it was incurred is immaterial. * * * In these cases [cited in the opinion] and many others that might be cited, the rules of law applicable to individuals were applied to the United States" (pp. 35, 36). A claim for recovery of money so held may not only be the subject of a suit in the Court of Claims, as shown by the authority referred to, but may be used by way of recoupment and credit in an action by the United States arising out of the same transaction.

It will be noted that the two taxes discussed in the *Bull* case involved not only the same transaction but the identical fund. It pertained to the recoupment of a tax illegal in toto in so far as the fund was concerned.

In the *McEachern* case, *supra*, the taxpayer had sold shares of corporate stock in 1924 for a profit of $295,000.00 payable in ten equal annual installments. After his death in 1928 the administrator continued to pay for the years 1928 to 1931, inclusive, income tax on the installments, whereas he should have reported as income for the year 1928 the capital gain included in the value of the unpaid installments at the time of decedent's death. The latter tax, however, was neither levied nor collected. Later the taxpayer sought to recover the overpayments in income tax for the years 1929 to 1931, inclusive. The Government sought as against such proper refund to recoup or offset the taxes which should have been paid in 1928, the levy and collection of which were then barred.

The court held that the Government could not prevent recovery by the taxpayer by pleading a barred claim. We quote:

> We may assume that, in the circumstances, equitable principles would preclude recovery in the absence of any statutory provision requiring a different result. But Congress has set limits to the extent to which courts might otherwise go in curtailing a recovery of overpayments of taxes because of the taxpayer's failure to pay other taxes which might have been but were not assessed against him. Section 607 of the 1928 Act declares that any payment of a tax after expiration of the period of limitation shall be considered an overpayment and directs that it be "credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim"; and § 609 (a) of the 1928 Act provides that "Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607." These provisions preclude the Government from taking any benefit from the taxpayer's overpayment by crediting it against an unpaid tax whose collection has been barred by limitation.

In the instant case two entirely different periods and two entirely different funds or transactions were involved. The taxpayer sought to offset against a tax properly levied on income arising from sale of property in 1932, what she claims were overlevies on income for the several years prior to 1929.

The question is: Do the limitation statutes prevent the allowance of such offset or recoupment?

Section 607 is of limited scope and does not apply to the facts of the instant case.

Section 608 of the Revenue Act of 1928 (45 Stat. 791, 874) is in part as follows:

> A refund of any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) made after the enactment of this Act, shall be considered erroneous—
>
> (a) if made after the expiration of the period of limitation for filing claim therefor, unless within such period claim was filed; * * *

Section 609 of the same act reads in part as follows:

> (b) Credit of barred overpayment.—A credit of an overpayment in respect of any tax shall be void if a refund of such overpayment would be considered erroneous under section 608.
>
> (c) Application of section.—The provisions of this section shall apply to any credit made before or after the enactment of this Act.

Plaintiff's facts come so squarely within the terms of these two sections when construed together, that to permit recovery by way of recoupment under the facts as disclosed by the record would be tantamount to judicial repeal of the statutory limitation provisions enacted by the Congress.

The various revenue acts from 1921 to 1932, inclusive, made provision for refund or credit of the overpaid portion of any income tax and set a time limit within which claims for such refund or credit must be filed.[2]

Plaintiff at no time filed a claim for refund of the alleged overpayment of taxes for the years prior to 1929.[3] She had the privilege of filing an application for a refund during those years and in the event of rejection to file timely suit therefor. Any rights which plaintiff had could have been protected through the remedy provided. If she had a right to an allowance for depreciation under the statutes in force at that time it could have been established. If the right to a refund could not have been established under the statutes then in effect plaintiff cannot properly claim recoupment now.

If the clear provisions of section 609 do not apply in the instant case it would be difficult to find one in which they would apply.

If plaintiff is permitted to recover by way of recoupment for distant years, then any taxpayer, so long as he is paying current taxes, may recover by way of recoupment for taxes overpaid in any year, however long past, and regardless

[2] Sec. 322 of the Revenue Act of 1928 (45 Stat. 791, 861); Sec. 284 of the Revenue Act of 1926 (44 Stat. 9, 66); Sec. 279 of the Revenue Act of 1924 (43 Stat. 253, 300); and Sec. 252 of the Revenue Act of 1921 (42 Stat. 227, 268). Sec. 322 of the 1928 Act, in substantially the same form, was carried forward in the Revenue Act of 1932 as Sec. 322 (47 Stat. 169, 242).

[3] *United States* v. *Felt & Tarrant Co.*, 283 U. S. 269, 270–273.

of any limitation statutes that might otherwise apply. The entire field would be opened up both for the taxpayer and the Government.

We are not unmindful of the merits of the principle of recoupment nor of the measure of justice which it permits.

But there is also a reason behind limitation statutes. Frequently records are lost and memories fade as to transactions long past. Facts are frequently then difficult of proof. Limitation statutes are enacted for the benefit of the taxpayer as well as the Government. While they are sometimes harsh in their operation, they more frequently operate to terminate what might otherwise be almost endless litigation and consequent confusion. There must be sometime a finality to tax levy as well as tax adjustment.

At any rate, the Congress, in its discretion and within its province, has enacted these provisions. We are not privileged to suspend or apply them at will, nor to shape them to our notion of the ends of justice.

The plaintiff is not entitled to recover and the petition must be dismissed.

It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

MORRISTOWN KNITTING MILLS, INC. v. THE UNITED STATES

[No. 45241. Decided February 2, 1942]

On Defendant's Special Plea

Floor-stocks tax under Agricultural Adjustment Act; jurisdiction; claim not complying with statute and regulations.—Where plaintiff, a manufacturer of hosiery, filed a claim for refund of floor-stocks tax paid under the Agricultural Adjustment Act, and where said claim was rejected by the Commissioner of Internal Revenue on the ground that the claim did not comply with the requirements of the Revenue Act of 1936, under which Act said claim was filed, and that said claim did not comply with the applicable Treasury Regulations under said Act; and where plaintiff in filing its claim or at any other

time did not submit to the Commissioner any evidence in support of said claim, as required by the statute and regulations; it is *held* that, no proper claim having been filed with the Commissioner in compliance with the statute and pertinent regulations, the Court of Claims is without jurisdiction and plaintiff's petition is accordingly dismissed.

Same.—The requirement that a claim for refund be filed with the Commissioner before litigation may be instituted "is a familiar provision of the Revenue Laws." *United States* v. *Felt & Tarrant Co.*, 283 U. S. 269, cited; also *Factors & Finance Co.* v. *United States*, 73 C. Cls. 707.

The Reporter's statement of the case:

Mr. George E. H. Goodner for the plaintiff. *Miss Helen Goodner* was on the brief. *Mr. Scott P. Crampton* was of counsel.

Mr. H. L. Will, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.* for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Plaintiff is a corporation organized under the laws of Tennessee in July 1927. Since that time it has engaged in operating a knitting mill at Morristown, Tennessee.

2. During 1933 and 1934 plaintiff's only product consisted of infants' long ribbed hose made from cotton yarn. The style or pattern of the hose varied with the size (count) of the yarn used. Each style was given a number. The average content of the hose manufactured was one pound of row or lint cotton per dozen pairs of hose. Plaintiff manufactured only upon orders received in advance. During the time here involved, plaintiff was knitting approximately 20,000 dozen pairs of hose from 20,000 pounds of yarn per month.

3. The Agricultural Adjustment Act (48 Stat. 31), imposed a tax on floor stocks of cotton at the rate of 4.4184 cents per pound, effective August 1, 1933. Pursuant to the act and regulations promulgated thereunder, plaintiff took an inventory of all cotton yarn and manufactured goods on hand on August 1, 1933. The total inventory consisted of 23,950 pounds of cotton. On August 31, 1933, plaintiff

made its return on the form prescribed to the Collector of Internal Revenue for the district of Tennessee. It paid the total tax shown thereon of $1,056.20 in monthly installments of $264.05 each on September 23, October 28, November 25, and December 20, 1933.

4. On June 30, 1937, plaintiff filed a claim, prepared on Treasury Department P. T. Form 76, for refund of $1,056.20, the floor-stocks tax paid by it. There was stricken from the printed form paragraph 4 reading as follows:

> 4. (a) That the amounts of the burden of the floor-stocks taxes which were borne by the claimant as set forth in column 3 above are true and correct, that the claimant has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amounts by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which such tax was paid; or (2) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amounts, be reimbursed therefor, or may shift the burden thereof; and (b) that the data and statements submitted in and made a part of Schedule D are true and correct.

In lieu of paragraph 4 plaintiff inserted the words "See statement attached." The statement referred to appeared in Schedule D and read as follows:

> It is impossible to determine and prove how much of the tax, if any, was not absorbed by claimant, and claimant believes, and therefore asserts that it absorbed all the tax.
>
> Claimant demands refund of the entire amount paid because the Supreme Court has held that it was illegally assessed and collected and because any attempt to condition or restrict the refund thereof, by requiring proof that the tax was absorbed by claimant, is unconstitutional and void.

5. Schedules "B" and "C" of the claim (P. T. Form 76) were left blank by plaintiff and no evidence was submitted either with the claim or at any other time in support thereof, except the statement appearing in Schedule "D."

6. The Commissioner of Internal Revenue rejected the claim for refund by a letter dated September 12, 1938, which states:

> Reference is made to your claim filed on P. T. Form 76 for refund of $1,056.20, floor-stocks tax paid under the provisions of the Agricultural Adjustment Act.
>
> You are advised that all claims for refund of amounts paid as tax under the Agricultural Adjustment Act are subject to the provisions of Title VII of the Revenue Act of 1936. Section 902 of the Act provides that no refund may be made or allowed of any such amount unless the person who paid the tax establishes that (1) he bore the burden of such amount and has not been or may not be relieved thereof, nor reimbursed therefor, and has not shifted such burden, directly or indirectly, through or by any of the means set forth in subsection (a) of section 902 of the Act, or (2) that he has repaid such amount unconditionally to his vendee who bore the burden thereof as provided in subsection (b) of section 902 of the Act.
>
> An examination of your claim discloses that paragraph (4) of the affidavit on the face of the claim form has been deleted.
>
> The claim as filed is not founded on the basis that you bore the burden of the tax, and there is no allegation in the claim, nor is there any evidence submitted therein to show that the burden of the amount for which refund is claimed was borne by you and not shifted to other persons within the terms of section 902 of the Act.
>
> Since the claim does not conform to the provisions of section 902 of Title VII of the Revenue Act of 1936 and affords the Commissioner no basis whatsoever to consider on its merits the question as to whether or not the burden of the amount for which refund is claimed has been borne by you and not shifted to others, the Commissioner is without authority in law to allow a refund of the amount claimed.
>
> Accordingly, your claim is hereby rejected in full.

7. Section 6 of the instructions appearing on page 4 of P. T. Form 76 provides as follows:

> 6. *Amount of claim.*—(a) The claimant shall enter in column 3 on the face of the claim form the amount of the burden of the floor-stocks tax borne by the claimant and which the claimant has not shifted to other persons

within the terms of section 902 (a) of the Act. The facts and evidence, together with exhibits and other data showing the amount of the burden of the tax borne by the claimant and not shifted to other persons, shall be made a part of Schedule D. (See paragraph 7.)

(b) The claimant shall enter in column 4 on the face of the claim form the amount of floor-stocks tax which the claimant has passed on but which he has repaid unconditionally to vendees within the terms of section 902 (b) of the Act. The claimant shall show on Schedule E the name and address of each such vendee, together with the amount and date of each repayment. The claimant must submit with his claim in support of each entry in Schedule E a statement, under oath, by each such vendee setting forth a complete description of the articles with respect to which the tax was repaid, the date of receipt thereof, and facts sufficient to establish that such vendee has borne the tax burden within the terms of section 902 (b) of the Act.

(c) No claim for refund of an amount paid as floor-stocks tax under the Agricultural Adjustment Act may be allowed in an amount less than $10. No refund shall be made or allowed of any amount paid or collected as tax under the Agricultural Adjustment Act to the extent that refund or credit with respect to such amount has been made to any person. (See paragraph 5.)

Section 7 of the instructions appearing on page 4 of P. T. Form 76 provides as follows:

7. *Facts and evidence.*—The claimant shall set forth in his claim in detail each ground upon which the refund is claimed. It is incumbent upon the claimant to prepare a true and complete claim and to present and substantiate by clear and convincing evidence all the facts necessary to establish his claim to the satisfaction of the Commissioner; failure to do so will result in the disallowance of the claim. The claimant is required to set forth clearly the facts of his claim and is privileged to prove those facts in any manner available to him and to submit such evidence to that end as he may desire.

8. It was the duty of the Collector, on receipt of plaintiff's claim for refund, to attach to it a copy of the "Inventory and Return" (or floor-stocks tax return), which had theretofore been filed by plaintiff, showing the amount of tax due, and forward it to the Commissioner of Internal Revenue at

Washington. The Commissioner of Internal Revenue would then examine the claim and evidence filed therewith and issue instructions to the Collector as to any investigation believed to be necessary or proper in connection with the claim.

9. The examiners of claims in the Washington office believed, from experience, that practically the only method available to the taxpayer to pass the tax on was by an increase in prices. Hence, in examining a claim they were interested in ascertaining how the sales prices moved after the effective date of the tax—whether they went up, remained stationary or were reduced. If the examiner found the sales price increased, an explanation was required of the taxpayer. If there were other factors introduced by the taxpayer affecting the price, these were considered and given due weight.

In the instant case, the Processing Tax Division at Washington rejected the claim on the ground that it did not conform to the provisions of Section 902 of Title VII of the Revenue Act of 1936. This division had no information except that set out in the claim and made no investigation as to the merits of the claim.

10. The Bureau of Internal Revenue did not consider the allegation in the claim as to the unconstitutionality of Title VII of the Revenue Act of 1936, because it believed that question was for the courts to decide.

11. Plaintiff in testimony before the Commissioner of this Court has presented substantial documentary and oral evidence with respect to the question of whether or not it bore the burden of the floor-stocks tax. This evidence includes plaintiff's sales records from August 1, 1933, to January 31, 1934, its cash journal sheets, and its orders on hand August 1, 1933, together with invoices of goods sold.

12. The 23,950 pounds of cotton in inventory on August 1, 1933, consisted of 3,091 pounds in finished goods which were boxed and ready for shipping; 10,859 pounds in yarn in the warehouse and on the machines in process; and 10,000 pounds in "seconds." The seconds are finished hosiery containing imperfections and they accumulate over a period of time.

13. On August 1, 1933, plaintiff had unfilled orders for 56,000 dozen pairs of hose. These orders would consume 56,000 pounds of cotton yarn in their manufacture. Plaintiff had 10,859 pounds of yarn on hand and would have to purchase the rest needed for the manufacture of hose to fill these orders. Some, the amount of which is not shown, had been contracted for. Not all the yarn on hand on August 1 would ordinarily be used before other yarn later obtained was used because different styles of hose required different sizes (or counts) of yarn and each particular stocking required different sizes of yarn in the leg, heel, and toe. No evidence was offered as to whether or not the yarn on hand on August 1, 1933, contained the usual proportions of the several sizes of yarn. Plaintiff did not keep records tracing each pound of yarn.

14. On July 17, 1933, the N. R. A. code increases in wage rates were put into effect by plaintiff. This increased plaintiff's labor cost by 33½ cents per dozen pairs of hose. The orders for 56,000 dozen pairs had been taken before the N. R. A. wage increases went into effect. On or about August 1, 1933, plaintiff began negotiating with its customers for increases in the contract prices sufficient to recover its increased costs. Most customers agreed to an increase in price equal to the total increase in cost, a few agreed to a lesser increase, and three refused to agree to any increase.

15. Of the orders on hand August 1, 1933, for 56,000 dozen pairs, plaintiff delivered only 6,531½ dozen pairs of hose between that date and January 31, 1934, on which the increased price over the contract price was not enough to cover the whole amount of the increased labor cost and floor stocks tax. The following table shows the increased prices per dozen pairs obtained from that group of customers.

Dozen pairs:	*Agreed price increase*
876	35 cents
1554½	32½ cents
766	30 cents
2955	15 cents
380	00 cents

All the rest of the hose delivered within that period were paid for at prices sufficiently increased to cover both the additional labor cost and the tax.

16. Between August 1, 1933, and January 31, 1934, plaintiff sold 12,258 dozen pairs of seconds at prices ranging from 30 cents per dozen to $1.15 per dozen. These prices were, in most cases, not greater than the prices for which such goods had sold before August 1.

17. Paragraph 4 in Form P. T. 76 was eliminated from plaintiff's claim and the statement appearing in Schedule D attached by plaintiff on advice of the attorney for the hosiery trade association of which plaintiff was a member.

The court decided that the defendant was entitled to judgment upon its special plea and that the petition of plaintiff should be dismissed.

Madden, *Judge*, delivered the opinion of the court:

Plaintiff sues to recover $1,056.20, paid as a floor stocks tax under the Agricultural Adjustment Act (48 Stat. 31, 40), which tax the Supreme Court of the United States held in *United States* v. *Butler*, 297 U. S. 1, had not been constitutionally levied. The Revenue Act of 1936, 49 Stat. 1648, enacted after the Supreme Court's decision, provided, in language hereinafter quoted, for the return, in some instances, to the taxpayer of such taxes. Plaintiff, on June 9, 1937, filed a claim for refund, which was promptly rejected by the Commissioner of Internal Revenue on the ground that the claim did not comply with the requirements of the 1936 Act and applicable Treasury Regulations. In September 1940, this suit was begun.

The defendant has filed a special plea urging that the court does not have jurisdiction of the case because no proper claim for refund was made to the Commissioner. Plaintiff replied to the special plea, urging that its claim for refund did comply with the statute, and that to whatever extent it did not comply with the Regulations, those regulations were *ultra vires* the Commissioner and it was not necessary to comply with them. A hearing was held

on the special plea and the facts recited in our findings were proved.

Pertinent provisions of the Revenue Act of 1936 are as follows:

SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exisits whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever.

SEC. 903. FILING OF CLAIMS.

No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless, after the enactment of this Act, and prior to July 1, 1937, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon

in support of such claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under the Agricultural Adjustment Act, and such regulations may require that claims for refund of processing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes.

SEC. 916. RULES AND REGULATIONS.

The Commissioner shall, with the approval of the Secretary, prescribe such rules and regulations as may be deemed necessary to carry out the provisions of this title. (49 Stat. 1648, 1747, 1755.)

Treasury Regulations 96, promulgated under the 1936 Act, and applicable to plaintiff's claim, were as follows:

ARTICLE 201. *Claims—Form and where to file.*—Claims for the refund of tax shall be made on the prescribed forms. Such claims shall be prepared in accordance with the instructions contained on the forms and in accordance with the provisions of these regulations. Each claim (except claims for refund of compensating tax—see article 401) shall be filed with the collector of internal revenue for the district wherein the claimant has his principal place of business. If the claimant has no principal place of business in the United States, the claim shall be filed with the collector of internal revenue located at Baltimore, Md. Copies of the prescribed forms may be obtained from any collector of internal revenue.

ART. 202. *Facts and evidence in support of claim.*—Each claim shall set forth in detail and under oath each ground upon which the refund is claimed. It is incumbent upon the claimant to prepare a true and complete claim and to substantiate by clear and convincing evidence all of the facts necessary to establish his claim to the satisfaction of the Commissioner; failure to do so will result in the disallowance of the claim.

The provisions of these regulations require that certain specific facts shall be stated in support of any claim for refund. The claimant is privileged to prove those facts in any manner available to him and to submit such evidence to that end as he may desire.

ART. 204. *Conditions as to tax burden with respect to amount of refund allowable.*—A refund may be allowed to the person who paid the tax, only of that amount paid as tax as to which the claimant establishes to the satisfaction of the Commissioner (1) that he bore the burden of such amount and has not been, or may not be, relieved thereof nor reimbursed therefor, and has not shifted such burden, directly or indirectly, through or by any of the means set forth in subsection (a) of section 902 of the Act; or (2) that he has repaid such amount unconditionally to his vendee who bore the burden thereof, as provided in subsection (b) of section 902 of the Act.

Plaintiff filed its claim, prepared on Treasury Department P. T. Form 76. On the form was an affidavit containing the following paragraph:

4. (a) That the amounts of the burden of the floor-stocks taxes which were borne by the claimant as set forth in column 3 above are true and correct; that the claimant has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amounts by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which such tax was paid; or (2) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amounts, be reimbursed therefor, or may shift the burden thereof; and (b) that the data and statements submitted in and made a part of Schedule D are true and correct.

This paragraph was deleted by plaintiff from the form and the words "See statement attached" were substituted. The statement, attached to Schedule D on page 3 of the form, was as follows:

It is impossible to determine and prove how much of the tax, if any, was not absorbed by claimant, and claimant believes, and therefore asserts that it absorbed all the tax.

Claimant demands refund of the entire amount paid because the Supreme Court has held that it was illegally assessed and collected and because any attempt to

condition or restrict the refund thereof, by requiring proof that the tax was absorbed by claimant, is unconstitutional and void.

Among the instructions appearing on page 4 of P. T. Form 76 were the following:

> 6. *Amount of claim.*—(a) The claimant shall enter in column 3 on the face of the claim form the amount of the burden of the floor-stocks tax borne by the claimant and which the claimant has not shifted to other persons within the terms of section 902 (a) of the Act. The facts and evidence, together with exhibits and other data showing the amount of the burden of the tax borne by the claimant and not shifted to other persons, shall be made a part of Schedule D. (See paragraph 7.)
>
> 7. *Facts and evidence.*—The claimant shall set forth in his claim in detail each ground upon which the refund is claimed. It is incumbent upon the claimant to prepare a true and complete claim and to present and substantiate by clear and convincing evidence all the facts necessary to establish his claim to the satisfaction of the Commissioner; failure to do so will result in the disallowance of the claim. The claimant is required to set forth clearly the facts of his claim and is privileged to prove those facts in any manner available to him and to submit such evidence to that end as he may desire.

Plaintiff submitted no evidence to the Commissioner of Internal Revenue either when it filed its claim, or at any other time. In the hearing before a Commissioner of this court on defendant's special plea, plaintiff has submitted a considerable amount of written and oral evidence, including its sales records from August 1, 1933, the day the tax was imposed, to January 31, 1934, its cash journal sheets, its orders on hand August 1, 1933, and invoices of goods sold. The evidence shows that its floor stocks, or taxable cotton on hand on the tax day, consisted of 10,859 pounds of yarn in its warehouse and on its machines in process of manufacture into children's stockings, its only product; 10,000 pounds of "seconds," or stockings with imperfections, which had accumulated from previous manufacture and were customarily sold at reduced prices; and 3,091 pounds of finished

goods boxed and ready for shipping. Each dozen pairs of stockings weighed a pound. Plaintiff on August 1, 1933, had unfilled orders for 56,000 dozen pairs of stockings.

On July 17, 1933, plaintiff put into effect wage increases required by the National Industrial Recovery Act, which increased its labor costs per dozen pairs of stockings, and per pound, by 33½ cents for stockings manufactured after that time. The floor stocks tax, which was laid on August 1, amounted to 4.4184 cents per dozen, making a total increase due to these two causes of 37.9184 cents per dozen.

Plaintiff, on or about August 1, negotiated with its customers, whose orders for first grade stockings it had theretofore accepted at specified prices, for an increase in those prices sufficient to cover its increased labor costs and taxes.[1] In most cases it was successful. As to only 6,531½ dozen pairs of stockings out of the 56,000 dozen ordered was it obliged to fill its orders for a price leaving it to bear any of the increased labor cost and tax. As to the customers who would not increase their contract prices by enough to cover the whole amount of these additions, many of them did increase their prices by lesser amounts ranging from 35 cents down to 15 cents per dozen and purchasers of only 380 dozen pairs refused any increase whatever. The following tabulation shows the action of customers who refused to completely relieve plaintiff of its added labor and tax costs.

Dozen pairs:	*Agreed price increase*
876	35 cents.
1,554½	32½ cents.
766	30 cents.
2,955	15 cents.
380	00 cents.

Plaintiff was, at the time in question, knitting some 20,000 dozen pairs of stockings from 20,000 pounds of yarn per month. As we have seen, out of the 56,000 dozen pairs for which plaintiff had orders on August 1, 1933, it secured increased selling prices of at least the amount of the labor

[1] As to some 46,000 dozen pairs of these stockings, plaintiff would not have any tax to pay, but it would probably have to pay for its yarn a price increased by the amount of the tax, if the yarn was contracted for after the tax became imminent.

cost increase and the tax as to all but 6,531½ dozen pairs. As to only 10,859 pounds of yarn had plaintiff paid any tax which it might possibly recover. Only by assuming, contrary to all probabilities, that the 6,531½ dozen pairs were made out of the 10,859 pounds of yarn taxed to plaintiff, would plaintiff be entitled to a refund as to all those pairs. If, more in accord with the probabilities, we should apportion the 10,859 pounds of taxed yarn to the 56,000 dozen stockings ordered, it would show a proportion of $x:6,531::10,859:56,000$, the solution of which would give 1,383 as the number of dozen pairs on which plaintiff had borne the tax, in whole or in part. But still better, the exhibits in the case seem to show that from plaintiff's records it would be possible to relate the 10,859 pounds of yarn taxed to the 6,531½ dozen pairs by applying a "first in, first out" rule of thumb which would be still more accurate.

As to the taxed yarn, then, that evidence shows that as to 4327½ (10,859 − 6531½) of the 10,859 pounds, plaintiff did not bear the burden of the tax, and as to the remainder, the evidence shows that the very great probability is that only as to about one-fifth $\left(\frac{10,859}{56,000}\right)$ of it, did it bear any of the burden, which approximations could have been reduced to greater certainty by evidence in plaintiff's possession.

As to the 3,091 dozen pairs of stockings which were boxed and ready for shipment on August 1, plaintiff has introduced no evidence as to whether or not they were among the goods shipped in response to unfilled orders on hand on August 1, as to most of which it had obtained price increases. As in the case of the taxed yarn, plaintiff could, apparently, have given information on this question.

The evidence as to the 10,000 pounds (dozens) of seconds on which plaintiff paid the tax is that it sold in the six months period following the tax day, 12,258 dozen pairs of seconds at specified prices, in most instances not greater than the prices it had been selling the same styles for before the tax was imposed. The record is complete except that it does not show, what would be probable, that in general, seconds were sold in about the order in which they were

made, and that therefore the taxed seconds were sold, or were probably sold, within the period. Plaintiff's president and manager, who was in active charge of the business when the tax was laid, when the refund claim was filed, and at the time of the hearing, could no doubt have given information as to that practice.

Plaintiff urges that the record shows that the question of whether plaintiff had or had not passed on the tax to its purchasers was a question which it was impossible to answer, and that therefore, it is entitled to a refund of the tax without having answered it.

We do not find here impossibility of proof of a sort which would prevent justice being done between the taxpayer and the government because of a want of evidence. It seems to us that the evidence available here for presentation to the Commissioner would have been as full and satisfactory as would be usual in this type of case, and that there is no more reason why it should have been withheld from the Commissioner in this than in any other case. Since we do not find the impossibility of proof for which plaintiff contends, it is not necessary to construe the 1936 statute to ascertain what Congress intended if proof should be impossible, nor to determine what constitutional problems might be raised, nor how they should be resolved, if Congress intended to deny recovery to a taxpayer when proof was in fact impossible.[2]

The real reason, as it seems to us, for plaintiff's refusal to comply with the statute and the Regulations is to be found in its theory, or that of the trade association which furnished the language of the refusal, that having paid the illegal tax, it was entitled to recover it with no questions asked as to whether it had passed it on. It refused to furnish the evidence because it regarded it as immaterial. But its theory was wrong. *Anniston Manufacturing Co.* v. *Davis*, 301 U. S. 337.

The requirement that a claim for refund be filed with the Commissioner before litigation may be instituted "is a familiar provision of the Revenue Laws." *United States* v. *Felt & Tarrant Co.*, 283 U. S. 269, 272. The practical

[2] Compare *Anniston Manufacturing Co.* v. *Davis*, 301 U. S. 337.

purpose served by it, viz, the disposition of most of such claims by departmental action and without litigation, has been stated by this court in *Factors & Finance Co.* v. *United States*, 73 C. Cls. 707, 717. The Circuit Courts of Appeals for the eight and sixth Circuits have, respectively in the cases of *Lee Wilson & Co.* v. *Commissioner*, 111 F. (2d) 313, and *Tennessee Consolidated C. Co.* v. *Commissioner*, 117 F. (2d) 452, held that claims for refund substantially identical with the claim here filed were insufficient and that the plaintiffs in those cases were, therefore, unable to present their claims in court. We agree with those decisions.

We conclude that plaintiff, having refused to comply with the requirements of the statute and with the valid regulations of the Department in the filing of its claim, has no right to be heard here upon that claim.

The defendant's Special Plea is therefore sustained, and the petition dismissed.

It is so ordered.

JONES, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

C. Y. THOMASON v. THE UNITED STATES

[No. 43701. Decided January 5, 1942. Plaintiff's motion for new trial overruled April 6, 1942]

On the Proofs

Government contract; delay in connection with culvert construction at Lake Okeechobee.—Where plaintiff entered into a contract with the Government for the construction of six culverts, outlets from Lake Okeechobee in Florida, to control the level of water in the lake so that it would be adequate for navigation and not so high as to flood the surrounding land; and where difficulties in the construction of one of said culverts resulted from the fact that the mud in the bottom of the lake was so light as to afford little support to the studs which were driven into it, the rock ledge on which the mud rested was so hard that the wooden studding would not penetrate it, and the steel sheeting which might have penetrated the rock would have been too expensive for the price plaintiff had bid on the job, and it was necessary to bring rock in barges to support the

cofferdam; it is *held* that the resulting delay and extra expense were not the fault of defendant, and plaintiff is accordingly not entitled to recover.

Same.—A notation on a drawing showing the contour of the lake bottom and the type of soil which a contractor might expect to find there, and showing the surface of the water as a certain depth above sea level, did not amount to an agreement by the defendant that the water would be maintained at that depth.

The Reporter's statement of the case:

Mr. Warren E. Miller for plaintiff.

Mr. John B. Miller, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff, C. Y. Thomason, entered into a contract with the United States on October 27, 1933, for the construction of six metal pipe drainage culverts at Lake Okeechobee, Florida. The necessary approach channels, rip rap, and diversion ditches were included in the contract and the culverts were identified in the contract as Nos. 1, 2, 3, 4–A, 5, 5–A. The contract, invitation to bid, specifications and drawings are contained in plaintiff's exhibits 1 and 2 and are by reference made a part of this finding.

2. Plaintiff brings this suit for damages in the sum of $11,052.12, of which $2,900 represents liquidated damage assessed against plaintiff and $8,152.12, reduced in plaintiff's brief to $4,037.39, is alleged to be the extra cost of construction on Culvert No. 3 owing to an increase in lake elevation from the elevation shown on the drawings and set forth in the specifications of the contract.

3. Contained in the invitation to bid was a direction that bidders visit the site of the work and familiarize themselves with conditions, and notice was given that samples of borings from the culvert sites were open to inspection at the Engineer's Office at Clewiston, Florida.

The provision read as follows:

> *Investigation of conditions.*—Samples of borings taken at the culvert structure sites are on hand at the U. S. Engineer's Office, Clewiston, Fla., where they should be

inspected by prospective bidders. It is expected that bidders will visit the site and acquaint themselves with all available information concerning the nature of the material that will be encountered in the canal and lake beds, the depth to which it may be necessary to excavate in order to secure satisfactory foundations, the possibility that the lake or canal bottom and/or banks will change from natural causes prior to or after commencement of the work and the local conditions, having a bearing on transportation facilities and handling and storage of materials. Failure to acquaint himself with all available information concerning these conditions will not relieve the successful bidder of assuming all responsibility for improperly estimating the difficulties entering into the cost of performing the complete work as required.

4. The contract required that the contractor proceed with the work ten days after notice so to do and two hundred and forty calendar days was designated as the time allowed to complete the construction work. On November 8, 1933, notice to proceed was given, thereby fixing July 6, 1934, as the completion date, being two hundred and forty days from the receipt of the notice. Actual work was started on December 2, 1933.

5. Lake Okeechobee is a large fresh water lake situated in the lower central part of Florida, sixty miles west of Palm Beach and seventy miles east of Fort Myers. The lake is comparatively shallow, its average depth varying from 7½ to 12 feet. The country surrounding the lake, known generally as "Everglades," is extremely flat and has an elevation of from 16 to 18 feet above sea level. The lake covers an area of approximately 720 to 730 square miles, being about 36 miles in length, north and south and about 32 miles wide from east to west.

In the Florida latitude the yearly rainfall is large; at times as high as 18 inches have been recorded in a month. During the rainy season, from June to November, the lake, prior to the improvements involved herein, usually reached high levels and overflowed the usual banks, particularly over the southern boundaries of the lake, causing great damage to crops and property.

The periodic hurricane conditions which sweep Florida and the Okeechobee region if coincident with a high water condition in the lake render the surrounding country uninhabitable with consequent loss of life from floods. As far back as 1850 this condition was sought to be remedied and attempts were made to drain the lake and control its heights. The early attempts were not successful because in the rainy season the canals did not take care of the rainfall in the Everglades and had little or no effect on the lake volume, whereas in the dry season the canals emptied their water into the lowered lake.

6. Prior to the time the Army Engineers took over the problems of Lake Okeechobee in July 1930, the St. Lucie Canal was built, which provided an outlet from the east side of the lake extending to the Atlantic Ocean at the town of Stuart.

This canal varies in its capacity according to the height of the water in Lake Okeechobee, i. e., at a lake stage of 19 its capacity is 7,000 second-feet; at lake stage 16, capacity 5,000 second-feet, and at stage 14, 3,500 second-feet.

Before the contract in the present suit was entered into, there were six other small canals to or from Lake Okeechobee, but except for the Caloosahatchee Canal whose capacity was 500 second-feet at high elevations of the lake, none of such canals was effective as an outlet for high water stages of the lake and they actually discharged water into the lake at low-water stages.

7. The purpose of the St. Lucie Canal and the Caloosahatchee Canal, as well as the smaller drainage canals, was to regulate the height of the water in Lake Okeechobee so that flood damage would be minimized. By closing the canal gates during the dry season and by opening them during the rainy season, a partial control of the lake elevation could be maintained.

8. The United States through the Engineer Corps had control only of the St. Lucie Canal at the time plaintiff's contract was under progress.

9. The maintenance of navigability of Lake Okeechobee and the canals was the most important consideration in the control of the water depths. When the lake elevation was

below 14 the navigability of the lake and its canals was impaired and correspondingly when the lake elevation rose above 17 the adjoining country was flooded and agriculture was seriously affected.

10. Only a relative control was possible by the United States, and in 1933 and 1934 the lake elevation frequently rose above 17 feet and fell below 14 feet. The only method or system employed to control the lake elevation during 1933–1934 was to lower the lake to a 16-foot elevation on September 1 and to regulate the outflow by anticipating how much water would be likely to flow into the lake from month to month thereafter during the rainy season.

11. There was on file in the office of the District Engineer at Jacksonville, Florida, records of the lake elevations from the year 1926 to 1933 taken and recorded monthly, but the direction to bidders to visit the site, familiarize themselves with conditions, and notice that borings were available at the Engineers Office at Clewiston, Florida (see finding 3, *supra*), made no mention of nor advised that such records were available at the Jacksonville Office of the District Engineer.

12. Plaintiff visited the site of the work in September or October 1933 before making his bid. He was shown the sites of some of the culverts by Government men and was directed to other culvert sites.

The center lines of the culverts were marked by flags, out in the water of Lake Okeechobee and others on the bank of the lake. There is some evidence that one or more of the flags had been knocked down or displaced at the time plaintiff inspected the sites, but there is no evidence as to which one of the culverts was so affected or whether the inshore or offshore flag was so displaced.

The elevation of the lake at the time of inspection by plaintiff was 16.9 feet but there was no gauge or marking at any of the culvert sites indicating this level. At the time of this inspection the site of Culvert No. 3 was entirely covered by water, the elevation of the lake being higher than when work actually commenced on this Culvert. Plaintiff knew that the elevation of the lake at the time of his inspection was 16.9 feet or more. He thought that it was 17.5 feet.

13. The main contention of plaintiff in this case centers about the data contained in sheet 15 of the contract drawing, plaintiff's exhibit 1, which by reference is made a part of these findings. This drawing shows the location of Culvert No. 3 with respect to the lake shore and the contour of the lake area at and surrounding the culvert.

The drawing with the accompanying data is dated October 1932. On the upper right hand corner of the drawing is a sectionalized profile of the lake taken on the center line of Culvert No. 3. Information is given not only as to the lake profile, but also the material composing the bed of the lake as for example the notations "Muck and Loose Rock"; "Sand and Muck," and "Muck." There is also shown on the profile section, a dotted line, entitled "Surface of Water, Elev. 13.9."

14. Plaintiff contends that the legend "Surface of Water, Elev. 13.9" appearing on this drawing was relied upon by him as the depth expected to be found and maintained at the site of Culvert No. 3 and that acting upon this data his bid was prepared and the work carried on.

The legend was not intended by the defendant to be an agreement that the water level would be reduced to and maintained at that elevation. Plaintiff had no reason to assume that it was so intended.

15. The specifications set forth in paragraph 6 the water depths that can be expected at a given elevation of Lake Okeechobee, to wit:

> 6. *Physical data.*—Lake Okeechobee itself is an inland fresh water lake approximately 730 square miles in area, centrally located in the lower peninsula of Florida, about 60 miles west of Palm Beach and 70 miles east of Fort Myers. The controlling depth from the Gulf of Mexico through the Calahootchee River and Canal is about 2½ feet to Moore Haven at a lake stage of 14.0 feet. From the east coast the lake can be reached through the St. Lucie River and Canal with a controlling depth of 6 feet but bypasses of the two locks limit the width of craft to 50 feet and the length to 150 feet. All depths given above are based on lake elevation of 14.0 feet above mean low water, and are referred to Punta Rasa datum.
>
> There are several towns near the sites of the work; they are Moore Haven, Clewiston, Lake Harbor, Belle

Glade, South Bay, Pahokee, and Canal Point. Each is connected with the others by paved highways and has rail connections. Clewiston has connection with the lake by a channel 40 feet wide and a depth of 6 feet at lake elevation of 14.0 feet. Paved highways for motor-truck or tractor hauling lead to and/or are adjacent to all culverts.

The lake stage at 14 feet in this specification was given as a datum point from which the navigable water depth of the lake and canals could be readily computed by the contractor to enable the necessary floating equipment, i. e., dredges and barges, to be moved to the site of the work as required. Plaintiff had no reason to assume that it was given as an agreement to maintain a 14-foot level of water.

16. The specifications, as amended by addenda, dated September 15, 1933, also contain certain requirements as to the cofferdams surrounding the proposed culverts.

> 2–01. *Cofferdams.*—(*a*) *General.*—The entire work at each site shall be constructed within a single cofferdam, or cofferdams may be built to enclose such sections of the work as may be approved by the contracting officer.
>
> (*b*) *Type.*—Any type of cofferdam may be used, subject to the approval of the contracting officer, provided, however, that the cofferdam shall provide protection to an elevation of plus 22.0 and have stability at least equal to that of a box-type cofferdam with a width at its base throughout the length at least equal to its height, with adequate protection against seepage water. Bidders shall submit with their bids a statement with necessary drawings or sketches showing type of cofferdam proposed to be used. After the award of the contract, the contractor shall submit such further detailed plans as the contracting officer may require before construction is started; but approval of such plans shall not relieve the contractor of his responsibility for the adequacy of the cofferdams. The contractor may propose separate coffers, installed either successively or simultaneously or may propose a single coffer surrounding the entire area. The entire work may be coffered off by earth dams, with such sheet pile cut-offs as may be necessary to prevent the entrance of water.

The matter of the lake elevations was also referred to in par. 8 of the General Specifications. As amended by ad-

denda dated September 15, 1933, that paragraph contained the following language:

> 8. *Flooding of Cofferdams.*—(a) In the event that work remains to be done and is actually in progress within the cofferdam constructed to elevation plus 22.0 at a given structure, and a hurricane flood overtops the cofferdam when built to full height, an allowance of $500 will, subject to the following, be made to the contractor for the structure so affected upon full resumption of work within the cofferdam * * *.

17. The defendant did not agree to maintain a definite elevation of Lake Okeechobee during the progress of the work on plaintiff's contract.

18. Construction of the cofferdam at Culvert No. 3 was commenced on March 19, 1934. At that time the lake elevation was 15.8. The area in which the culvert was to be built was entirely under water. The type of cofferdam under construction was earth filled, that is the muck or earth available at the site was placed within and against a one-inch plank sheathing which was attached to posts or piles of 2 x 6 or 2 x 8 dimension driven into the bottom of the lake.

This earth or muck which was available as a filling material at Culvert No. 3 was a mixture of light soil and vegetable matter. When wet or mixed with water it was a light, soupy material with little inherent stability.

After the box type cofferdam was completed, an attempt to pump out the water from it was made on April 16, 1934. When the water level within the cofferdam was lowered about 3 feet, leaving about 4 feet of water still within it, the dam broke.

Beginning on May 2, the dam was repaired, but on May 8 it again gave way. It was repaired on May 9 and May 10, and again on May 11 it broke. Repairs were again started, another break occurred on May 16 and repair and excavation continued up until May 26.

From May 26 to May 31 work was stopped on the dam awaiting the arrival of timber for cribbing to be used on the dam.

From June 1 to June 11 repairs were made consisting of placing arched cribs in the cofferdam until with reinforcing rock placed on the inside of the dam, it held and was effective.

19. Prior to the failure of the cofferdam at No. 3 Culvert, plaintiff's inspector on March 21, 1934, in his daily report to the home office stated: "It looks as though we will have to use steel sheeting for this cofferdam."

Steel piling was employed successfully on projects in and about Lake Okeechobee and it could have been used successfully on cofferdam No. 3. The rock ledge beneath the soft mud at the bottom of the lake was too hard to be penetrated by wooden studding.

It is a much more expensive material than wood or other piling and plaintiff testified that because of extra cost it was not used by him on this dam.

20. There is no dispute regarding part of the time for which the costs of repair to complete the cofferdam are to be computed, that is, from May 11 to June 11. The plaintiff, however, claims that the operation was not consummated until June 18 and that costs are to be so reckoned. From the daily reports of defendant from May 11 to June 18, it appears that the period of repair and construction of the cofferdam at Culvert No. 3 embraced the period from May 11 to June 18 inclusive.

21. The cost of this work was as hereinafter set forth:

Labor	$1,977.89
Rock, 100 tons	261.00
Pumping	360.00
Crane and dragline	813.17
Insurance	58.29
	3,670.35

In ascertaining the cost for the extra work on cofferdam No. 3, by agreement of the parties a Government auditor visited the office of plaintiff and with plaintiff's assistance examined and made an audit of the costs attributed to the repair of the cofferdam. An agreement as to the base cost per day for labor, pumping, and insurance was reached, but the item of rock used in the cofferdam was disputed as well as the allowance of cost for the crane and draglines. The record discloses only 100 tons of rock delivered to the contractor.

The Bucyrus crane had an established rental value of $4.00 per day but the P. & H. crane owned by the contractor, after

allowances were made for cost, depreciation, oil, and gas, justified a daily average cost of operation to the contractor of $1.97.

CLAIM FOR REMISSION OF LIQUIDATED DAMAGES

22. Notice to proceed was given the contractor November 8, 1933, and the completion date of the contract was determined to be July 6, 1934.

The General Specifications provide, par. 3, page 2, that if the contractor fails to complete the work within the period so fixed, he shall pay $100 per day to the United States, as liquidated damage. A change order was made on May 24, 1934, because of conditions making the use of piles necessary for the foundation work on Culvert No. 4–A. This order allowed 45 calendar days in addition to the original time limit set. An additional 24 days was also allowed plaintiff because of the delay by the Government in preparing and having the change order approved. All told sixty-nine days over and above the original completion date of the contract were granted to plaintiff, which determined the completion date to be September 13, 1934.

These extensions were sufficient to cover the delays they were intended to cover.

Twenty-nine days after September 13, 1934, to-wit, on October 12, 1934, the work on the culverts was accepted by the United States and the sum of $2,900 liquidated damage was withheld from the final settlement payment.

23. According to plaintiff's plan for progress on the culverts, excavation work of Culvert No. 1 was to begin November 27, 1933 and on Culvert No. 2 on January 1, 1934. March 1, 1934 was the original date set for excavation on Culvert No. 3 and on Culvert No. 4–A March 15, 1934. Excavation on all culverts was to be completed by April 1, 1934.

The first work on the contract was on Culvert No. 1 on December 2, 1933, when excavating began.

Excavation work was begun on Culvert No. 2 on January 31, 1934, thirty days later than the progress schedule laid out, and on Culvert No. 3 on March 19, 1934, eighteen days later than the schedule. Work on Culvert No. 4–A was

started on April 28, 1934, forty-four days after the date set in plaintiff's progress schedule.

24. Plaintiff was not delayed by the defendant in the performance of the work called for by the contract. The failure of the cofferdam No. 3 was the cause of the contractor's difficulties. The factors contributing to the failure were the instability and fugitive nature of the "muck" which plaintiff used in the earth cofferdam, the type of cofferdam first used, which, in view of the conditions of work encountered, proved inadequate.

Because of the inadequacy of this cofferdam and its many failures, the utilization of plaintiff's equipment of cranes and draglines could not follow the progress schedule as to the various culverts. This resulted in further delay.

LABOR CONDITIONS

25. Delay is attributed by the contractor to the fact that inexperienced, incompetent, and incapable workmen were supplied by the United States Employment Service. In the immediate neighborhood of Lake Okeechobee there were from 1,000 to 1,500 laborers supplied to various employers through the same service. Plaintiff employed about 50 to 60 men and it was difficult to get efficient labor. The inefficient had to be trained by plaintiff. The extent to which labor inefficiency affected the progress of the work is not proved. The labor supplied to plaintiff was as efficient as was to be expected from the sources from which plaintiff agreed, in his contract, to secure his labor.

NIGHT WORK

26. Plaintiff secured the approval of the contracting officer to work at night on Culvert No. 3, but the prevalence of mosquitoes defeated this plan. The presence of the mosquitoes was not an unforeseen condition. No specific delay is proved to have been the result of the failure to work at night.

27. Plaintiff did not file any written protest with the contracting officer as required by Par. 1-01, page 7, of the specifications, which reads:

> *Claims and Protest.*—If the contractor considers any work to be outside the requirements of the contract, and

considers any record or ruling of the inspectors or contracting officer as unfair, he shall ask for written instructions or decision immediately and then file a written protest with the contracting officer against the same within ten (10) days thereafter, or be considered as having accepted the request or ruling.

The court decided that the plaintiff was not entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

Plaintiff seeks to recover from the defendant $2,900, the amount the defendant assessed against plaintiff for liquidated damages for 29 days delay in the competion of work done by plaintiff for the defendant under a contract, and in addition, damages of $4,037.39 alleged to have been caused plaintiff by the defendant's breach of contract.

The contract was for the building of six culverts, outlets from Lake Okeechobee in Florida, to control the level of water in the lake so that it would be adequate for navigation and not so high as to flood the surrounding land. The contract was entered into October 27, 1933, and plaintiff agreed to begin work within 10 days of receipt of notice to proceed and to complete the work within 240 days thereafter, except as the time might be extended. Notice to proceed was given on November 8, 1933.

Plaintiff had difficulties with his cofferdam on the No. 3 culvert. He started work there on March 19, 1934. The water at the location of this culvert and within the area of the cofferdam varied from zero to about six and one-half feet in depth, with an average depth of about five feet. Posts of 2 x 6 or 2 x 8 dimensions were driven into the mud and one inch board sheathing was attached to the posts to form the sides. The box so made was filled with the muck available nearby. When on April 16 the water was pumped out of the box, the box collapsed when the water level had been lowered about three feet. Attempts to repair were made, followed by successive failures until on June 11, rock having been placed in the cofferdam, it held so that the work could be completed.

Plaintiff claims that the reason for the difficulties at No. 3 culvert was that the defendant, in the specifications which

were a part of the contract, agreed that the level of the surface of the water at the site of this culvert would be 13.9 feet above sea level, unless it was raised or lowered by natural causes; that the surface was in fact 15.9 feet above sea level when plaintiff did his work; that this higher level was artificially maintained by the defendant through the exercise of controls over the escape of the water of the lake into an outlet canal; that if the water level had been as agreed upon, the average head of water to be withstood by the cofferdam would have been two and one-half feet instead of five feet; and that the dam as constructed would not have failed. Plaintiff bases his claim that the defendant agreed that the water level would be at 13.9 feet upon the following facts.

First: A drawing prepared by the defendant to accompany the specifications furnished to bidders showed the contour of the land and the location of the canal, the proposed levee, and the proposed No. 3 culvert. In the upper right hand corner of the map was a small drawing labeled "Profile Along Center Line of Proposed Location of Drainage Structure. Classification Determined by Probings." The map showed the contour of the bottom of the lake at this location, the nature of the substance at and under the bottom as "Muck and Loose Rock," "Sand and Muck," and "Muck" at different points. The drawing showed a horizontal line near the top with the legend "Surface of Water Elev. 13.9." The whole drawing was dated as "approved March 23, 1933," by the defendant's consulting engineer.

Second: On page 2 of the printed specifications, under the heading "Physical Data" appears the following language quoted in finding 15:

> 6. *Physical data.*—Lake Okeechobee itself is an inland fresh water lake approximately 730 square miles in area, centrally located in the lower peninsula of Florida, about 60 miles west of Palm Beach and 70 miles east of Fort Myers. The controlling depth from the Gulf of Mexico through the Caloosahatchee River and Canal is about 2½ feet to Moore Haven at a lake stage of 14.0 feet. From Moore Haven to the lake there is a controlling depth of 3 feet through the Moore Haven approach canal at lake stage of 14.0 feet. From the east coast the lake can be reached through the St. Lucie River and Canal with a controlling depth of 6 feet, but by-

> passes of the two locks limit the width of craft to 50 feet and the length to 150 feet. All depths given above are based on lake elevation of 14.0 feet above mean low water, and are referred to Punta Rasa datum. There are seven towns near the sites of the work; they are Moore Haven, Clewiston, Lake Harbor, Belle Glade, South Bay, Pahokee, and Canal Point. Each is connected with the others by paved highways and has rail connections. Clewiston has connection with the lake by a channel 40 feet wide and a depth of 6 feet at lake elevation of 14.0 feet. Paved highways for motor or tractor hauling lead to and/or are adjacent to all culverts.

As to the second of these points, we see in it no basis for plaintiff's claim that the defendant agreed to maintain a water level as low as 14 feet. It was a truthful statement as to what depth of water in various approaches to the lake might be expected for bringing in materials, for example when the water in the lake was at a 14-foot level.

We also think that the notation on the drawing showing the contour of the bottom of the lake and the type of soil which a contractor might expect to find there, and showing the surface of the water as 13.9 feet above sea level, did not amount to an agreement by the defendant that the water would be maintained at that depth. It was natural for the drawing to show the water level as it was when the soundings were made, as it was a scale drawing and unless it was to be left open at the top it would have to show the surface somewhere. Plaintiff testified that at the time he looked at the site in September or October 1933 before he made his bid he knew that the level of the water was about 17.5 feet. In those circumstances he had no reason to interpret the notation on the drawing of 13.9 feet as an agreement by the defendant to abandon its control of the level in the lake and permit it to recede to 13.9 feet.

Furthermore, plaintiff agreed in the contract to build his cofferdams so as to "provide protection to an elevation of plus 22.0" feet. He says that this agreement is immaterial to the issue here; that if he did not comply with that part of the agreement and if his cofferdam was overtopped by water, he would have to stand the loss himself, whereas if he did as he

agreed and built to a 22-foot height and still the water overtopped the dam, the defendant would compensate him. We think that the words and intent of the agreement are incompatible with plaintiff's claim that the defendant should compensate him for the expense and excuse him for the delay caused by the collapse of his cofferdam when the water level was only about 16 feet.

Even if the defendant had agreed to permit the water level to go down to 13.9 feet while plaintiff was doing his work, and had instead maintained it at 15.9 feet, we think plaintiff could not recover because he has not proved what part, if any, of his difficulties and expenses at Culvert No. 3 were caused by the additional two feet of depth. If the water level had been two feet lower, the average depth would have been about three feet, but the depth in some places would have been four and one half feet. Plaintiff's cofferdam as constructed collapsed when the water level inside it was lowered three feet, hence it would have collapsed under the more than 3-foot head of water which it would have had to withstand at some places even if the level had been the lower one.

Plaintiff's difficulties at Culvert No. 3 really resulted from the fact that the mud in the bottom of the lake was light and afforded little support to the studs which were driven into it; the rock ledge on which the mud rested was so hard that the wooden studding would not penetrate it at all; and steel sheeting which might have penetrated the rock would have been too expensive for the price that plaintiff bid on the job. As a consequence of these factors, plaintiff's attempts were futile until he brought rock in barges to support the cofferdam.

We conclude, therefore, that the defendant is not responsible for the delay and expense incurred by plaintiff at Culvert No. 3.

We do not consider whether plaintiff was denied the right to a decision of the contracting officer on the question of an extension of time, since, in view of what we have said, the result would not be affected thereby. Neither do we consider what would be the effect of an admission by the defendant that no actual damage resulted from the delay in completing the work, since there is no such admission. We think

that the extension of time given plaintiff on account of the change order on Culvert No. 4–A was adequate.

It follows that plaintiff's petition must be dismissed.

It is so ordered.

JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice, concur.*

WHITAKER, *Judge*, took no part in the decision of this case.

FISCHBECK SOAP COMPANY, A CORPORATION, v. THE UNITED STATES

[No. 44663. Decided January 5, 1942. Defendant's motion for new trial overruled April 6, 1942]

On the Proofs

Excise tax; toilet soap.—Where it is established by the evidence that the soap manufactured by the plaintiff and sold under the name "Queen Lily" might be used for toilet purposes but its predominant use is as a laundry soap; and where it was manufactured for use as a laundry soap only and advertised and sold as such; it is *held* that the sale of said soap is not taxable under section 603 of the Revenue Act of 1932 and plaintiff is accordingly entitled to recover. *Flash Chemical Co.* v. *United States*, 87 C. Cls. 350, distinguished.

Same.—Soaps advertised and sold primarily for general cleaning or laundry purposes, which have only an incidental use as toilet soaps, are not taxable under the Act (47 Stat. 169, 261). *Sharpe & Dohme, Inc.*, v. *Ladner*, 82 Fed. (2d) 733, and other cases cited.

The Reporter's statement of the case:

Mr. Ralph P. Wanlass for plaintiff. *Mr. Walter G. Moyle* was on the brief.

Mr. J. H. Sheppard, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. During the period involved in this suit, June 1932 to March 1933, both inclusive, plaintiff was a corporation or-

ganized and existing under and by virtue of the laws of the State of California, with its principal place of business in San Francisco in that state. During that period plaintiff was engaged in the manufacture and sale of soap under the trade name "Queen Lily."

2. Queen Lily soap was manufactured and sold in a white bar, approximately 4½ inches long, 2½ inches wide, and 1¾ inches thick. The bar weighed approximately 13 ounces, and contained indentations to permit convenient division into three parts. It was sold in a wrapper on which appeared the following legend:

WASHES WITHOUT RUBBING

H. FISCHBECK & CO., the manufacturers of the QUEEN LILY SOAP, are the proprietors of the first and only soap that washes without rubbing. It was introduced on this Coast in the year 1869 by the inventor. From our long experience, and with improved machinery, the great reduction in material and labor, we are now able to offer this brand at a greatly reduced price, and in quality and finish vastly superior to any heretofore manufactured by us.

In using all other kinds of soap, it is necessary to wash the clothes perfectly clean before boiling, or the dirt will become SET OR BOILED into the fabric, and cannot be washed out.

In using the Queen Lily Soap it is IMPOSSIBLE to BOIL the dirt in, it BOILS IT OUT. The finest Linens, Cambrics, and Laces washed with this Soap come from the wash sweet, pure, and uninjured.

For the Toilet and Bath it has no equal—unlike most other soaps, which leave the skin parched and dry, and liable to crack; it imparts flexibility and moisture to the skin.

It has no equal for washing flannel goods. It is excellent for washing paint work. It removes grease and pitch from fabrics. For cleaning and shampooing the head it produces wonderful effects.

Do not rub the clothes when you take them from the soaking water, put them into the boiler just as they are; after they have boiled from fifteen to twenty minutes, take them from the boiler and put them into a tub; pour just sufficient cold water on them so that you can handle them, then examine them. Socks and other articles that are stained may require a little rubbing.

In large type in two places on the label the following words appeared:

EASY ON THE CLOTHES
EASY ON THE HANDS

3. During the period June 1932 to March 1933 plaintiff failed to file excise tax returns under Title IV of the Revenue Act of 1932 covering the sales of Queen Lily soap. A deputy collector of Internal Revenue, pursuant to the provisions of section 3176 of the Revised Statutes, deeming Queen Lily soap subject to taxation under the provisions of section 603 of the Revenue Act of 1932, prepared and filed excise tax returns for the plaintiff on May 4, 1934 covering the aforesaid period. The returns disclosed a tax liability in amount of $1,065.92, which, together with interest and penalties, was duly assessed in the amount of $1,667.14 and paid on April 20, 1935.

4. On September 14, 1936 plaintiff filed with the Collector of Internal Revenue a claim for refund in the amount of $1,670.86, on the ground that Queen Lily soap was not taxable as a toilet soap. The claim was rejected by the Commissioner of Internal Revenue on May 8, 1937.

5. The Federal Standard Stock Catalogue, Section IV (Part 5), being Federal Specification for floating white toilet soap for the use of the departments and independent establishments of the Government in the purchase of this commodity, contains the following, in substance:

B. GRADE.

B-1. White, floating soap shall be of but one grade.

D. GENERAL REQUIREMENTS.

D-1. White, floating soap shall be a cake soap, at least as good in every respect as one made from soda and a mixture of high-grade tallow with 25 to 30 percent of coconut oil, of good light color, without objectionable odor, thoroughly saponified, and so prepared as to float on water.

E. DETAIL REQUIREMENTS.

E-1a. Matter volatile at 105° C. shall not exceed 34 percent. Deliveries which yield more than 34 percent volatile matter will be rejected without further test.

E–1b. The sum of free alkali, total matter insoluble in alcohol, and sodium chloride shall not exceed 2.0 percent.

E–1c. Free alkali, calculated as sodium hydroxide (NaOH), shall not exceed 0.15 percent.

E–1f. Chloride, calculated as sodium chloride (NaCl), shall not exceed 1 percent.

E–1g. Matter insoluble in water shall not exceed 0.2 percent.

E–1h. Rosin, sugar, and foreign matter shall not be present.

E–1i. The acid number of the mixed fatty acids prepared from the soap shall be not less than 212.

E–1k. The percentage of matter volatile at 105° C. will be computed on the basis of the soap as received, but all other constituents will be calculated on the basis of material containing 28 percent of volatile matter.

6. Under date of March 7, 1940 the chemist for the Bureau of Internal Revenue at Washington submitted to the Bureau, in connection with the determination of the taxability of the soap herein involved, his report of the chemical analysis of the sample of soap manufactured and submitted for the purpose by plaintiff, which is as follows:

Matter Volatile at 105° C. (Water)	23.97%
Matter insoluble in Alcohol (Sodium Carbonate)	1.54%
Sodium Chloride	0.10%
Anhydrous Soap	74.39%
Matter insoluble in Water	Trace
Acid number of mixed fatty acids	227
Free alkali	None
Free acid	None

A chemical analysis of Queen Lily soap as of September 22, 1939, made by Curtis-Tompkins, chemists employed by plaintiff in California, is as follows:

Matter Volatile at 105° C. (Water)	21.32%
Sodium Carbonate	2.52%
Sodium Chloride	0.06%
Anhydrous Soap	67.16%
Matter insoluble in Water	0.05%
Sodium Borate	2.02%
Glycerol	6.72%

7. In the manufacture of this soap there was added a sufficient scent or perfume to neutralize the odor of the fats.

This scent was not discernable unless the soap was held close to the nose. The acid number of mixed fatty acids indicates that a mixture of oils was used in the manufacture of the soap, and the number "227" indicates that some of the oils was cocoanut oil. The absence of free alkali indicates absence of free caustic soda, which if present would irritate the skin, both if the soap were used for toilet purposes and if it were used in washing clothes by hand. The absence of free acid indicates that the soap had been thoroughly and clearly saponified. It is a white floating soap.

8. Plaintiff had manufactured Queen Lily soap under substantially the same formula and used substantially the same wrapper since before 1904, and up to and including the period involved in this suit.

9. The analysis of the Bureau shows volatile matter at 23.97 percent, and the Curtis-Tompkins analysis made for plaintiff shows 21.32 percent, which is not a material difference. The analysis of the Bureau chemist shows 74.39 percent, while that of Curtis-Tompkins shows 67.16 percent of anhydrous soap, which difference may be explained by analyzing soap from different batches, or by using a different method of arriving at the determination of the amount of volatile matter at 105° C.

The Bureau analysis shows sodium carbonate 1.54 percent, while the Curtis-Tompkins analysis shows 2.52 percent, which is an appreciable difference for that particular item. The Curtis-Tompkins analysis shows glycerol 6.72 percent, no test having been made as to this by the Bureau. Used in the amounts shown in the analyses, the item of sodium carbonate would not be injurious to the skin. Glycerol enhances the quality of the soap with respect to its effect on the skin.

The soap contains slight amounts of a derivative of benzine, turpentine, and ammonia, but in the Bureau analysis no specific test was made for gasoline, turpentine, or ammonia, except that these should have been detected in the determination of free alkali, and none were so found.

There is no ingredient shown in either analysis in amounts or percentages that would be injurious to the skin when or if used as a toilet soap.

10. Queen Lily soap was largely sold through the wholesale and retail trade grocery stores, and was held out by them as a laundry soap, and segregated with laundry soap on the shelves in their stores. It was purchased by housewives for a laundry soap.

Plaintiff's salesmen represented Queen Lily soap exclusively as a laundry soap, but stated that it was not harmful to the hands. In newspaper and other advertising Queen Lily soap was represented exclusively as a laundry or household soap.

11. In March 1933 plaintiff's supply of wrappers was exhausted. It had new wrappers printed, which omitted that part of the old wrapper which reads as follows:

> For the Toilet and Bath it has no equal—unlike most other soaps, which leave the skin parched and dry, and liable to crack; it imparts flexibility and moisture to the skin.

The wrapper in which the soap was wrapped was printed on cheap paper similar to that used by newspapers. It had the appearance of wrappers in which other laundry soaps are wrapped, and was not at all similar to the wrappers in which toilet soaps are wrapped.

12. Plaintiff did not increase its price of Queen Lily soap at the time the Revenue Act of 1932 became effective. The tax involved herein was not included by plaintiff in the selling price of the soap, and has not been collected from plaintiff's vendees. After payment, the tax was charged on plaintiff's books to the general expense account, and subsequently charged to profit and loss.

13. Under date of August 23, 1935, D. S. Bliss, Deputy Commissioner of Internal Revenue, sent a letter to counsel for taxpayer in which he said:

> Reference is made to your letter dated July 30, 1935, in which you request to be advised as to whether certain language submitted by you may be used on the label of Queen Lily Laundry Soap without bringing the product within the scope of section 603 of the Revenue Act of 1932.
>
> The statement you wish to use is as follows:
>
> "Queen Lily is all soap—contains no alkali or harmful fillers, which are so injurious to the skin. Queen Lily

> is easy on the hands, being absolutely pure, lasts longer, does not require rubbing and can be safely used on the most delicate fabrics and fine woolens. Not only will your clothes last longer when you use Queen Lily but notice with what a minimum of effort you have completed your dishwashing and laundering without any injurious effect on your hands."
>
> It is held that Queen Lily Laundry Soap when sold under a label containing the above reading matter will not be subject to the tax imposed by section 603 of the Revenue Act of 1932.

The formula used in the manufacture of Queen Lily soap at this time was practically the same as during the period here involved.

14. The percentages or quantities of the ingredients as shown in the analyses cause Queen Lily soap to come within the requirements for toilet soap as set forth in Federal specifications for toilet soap.

The court decided that the plaintiff was entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

The question presented is whether or not the plaintiff's soap, called "Queen Lily," is a toilet soap and is used or applied or intended to be used or applied for toilet purposes and, therefore, taxable under section 603 of the Revenue Act of 1932 (47 Stat. 169, 261), which reads as follows:

> SEC. 603. *Tax on toilet preparations, etc.*—
>
> There is hereby imposed upon the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to 10 per centum of the price for which so sold: Perfumes, essences, extracts, toilet waters, cosmetics, petroleum jellies, hair oils, pomades, hair dressings, hair restoratives, hair dyes, tooth and mouth washes (except that the rate shall be 5 per centum), dentifrices (except that the rate shall be 5 per centum), tooth pastes (except that the rate shall be 5 per centum), aromatic cachous, toilet soaps (except that the rate shall be 5 per centum), toilet powders, and any similar substance, article, or preparation, by whatsoever name known or distinguished; any of the above which are used or applied or intended to be used or applied for toilet purposes.

We are satisfied from the proof that it might be used for toilet purposes, but we are also satisfied that its predominant use is as a laundry soap. Its use for toilet purposes is rare. The manufacturers of it intended it for use as a laundry soap only. The testimony shows that it was never advertised as anything but a laundry soap, and the plaintiff's salesmen never sold it for anything other than laundry soap. Neither in the advertising in the newspapers, nor by window displays, nor in the sales talks of the salesmen was it ever held out as useful for toilet purposes, but only for laundry and household purposes. It was sold to wholesale grocers, who bought it as a laundry soap, and they sold it to their retail customers as a laundry soap. It was carried on their shelves with other laundry soaps and never with toilet soaps. Consumers purchased it for laundry or household uses.

The above is testified to by plaintiff's employees, the manager, the sales manager, and salesmen, and also by wholesale grocers who purchased it, and by plaintiff's advertising man, and by a representative of a newspaper which carried the advertising. The sole evidence to the contrary is the recitation on the wrapper in which the soap was wrapped, which reads as follows:

> For the Toilet and Bath it has no equal—unlike most other soaps, which leave the skin parched and dry, and liable to crack; it imparts flexibility and moisture to the skin.

An examination of this wrapper, however, discloses that this was thrown in incidentally as still another use which might be made of the soap. The chief claim made in the wrapper was that it was good for washing clothes. The directions for its use were confined exclusively to its use in washing clothes.

The wrapper itself is not such a wrapper as would be used on a toilet soap. It was made of paper of the grade used by newspapers and presented the appearance of wrappers on other laundry soaps. It is a cheap wrapper; it looks nothing like the wrappers around toilet soaps. The proof shows that this company started manufacturing this soap in the 1860's, and that they have used practically the same wrap-

per ever since. Whether or not it was held out as a toilet soap many years ago, we are satisfied that it was not so held out during the period in question. The recitation in the wrapper that it was a good toilet soap was merely a survival of a claim made many years back.

It is well settled by both article 22 of Regulations 46 and court decisions that soaps advertised and sold primarily for general cleaning or laundry purposes, and which have only an incidental use as a toilet soap, are not taxable under the Act. *Sharpe & Dohme, Inc.*, v. *Ladner*, 82 F. (2d) 733; *Mentholatum Co.* v. *Motter*, 71 F. (2d) 1013; *Takara Laboratories* v. *United States*, 100 F. (2d) 1022.

We are satisfied that this soap was not held out for use as a toilet soap during the period in question, notwithstanding the above-quoted recitation on the wrapper in which the soap was wrapped.

In March 1933 the plaintiff's supply of wrappers containing this recitation had been exhausted and new wrappers were printed which omitted this recitation. Since that time the Commissioner of Internal Revenue has asserted against it no tax under this section.

We hold that the sale of this soap is not taxable under the quoted provision of the Revenue Act, and that plaintiff, therefore, is entitled to the refund sought.

This is not inconsistent with our holding in *Flash Chemical Co.* v. *United States*, 87 C. Cls. 350. Finding 7 in that case shows that this soap was advertised equally as a soap for the hands as for household use. The opinion states that 75 percent of its use was for cleaning hands, and only 25 percent for general household use. The opinion expressly stated that its use for toilet purposes was not merely incidental. In the present case the testimony shows that this soap was not held out as a toilet soap during the period in question and that its use for this purpose was only occasional and incidental.

Judgment will be entered against the defendant in favor of plaintiff in the sum of $1,667.14, with interest as provided by law. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

EDMOND L. VILES v. THE UNITED STATES

[No. 45416. Decided January 5, 1942. Plaintiff's motion for new trial overruled April 6, 1942]

On Defendant's Plea to the Jurisdiction

Relief to persons erroneously convicted in Federal courts.—The Act of May 24, 1938, an act to grant relief to persons erroneously convicted in the Federal courts, applies only to acquittals or pardons after the passage of the act.

Same.—In the instant case, it is *held* that the pardon does not contain the recitals called for by the Act of May 24, 1938.

Mr. Edmond L. Viles pro se.

Mr. Robert E. Mitchell, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The facts sufficiently appear from the opinion of the court.

WHITAKER, *Judge*, delivered the opinion of the court:

This case is before us on what the defendant calls its plea to the jurisdiction. The paper filed is not a plea, but is in all essential respects a motion to dismiss for lack of jurisdiction, and it will be so treated.

It is grounded, first, on the fact that the petition, with the annexed exhibits, shows on its face that the pardon was granted prior to the passage of the Act of May 24, 1938 (52 Stat. 438), and that this Act applies only to acquittals or pardons after the passage of the Act. The case is brought under the terms of this Act of May 24, 1938 for the relief therein granted, and that Act plainly has application only to such pardons as are granted after its passage. The first section of the Act reads:

> That any person who, having been convicted of any crime or offense against the United States and having been sentenced to imprisonment and having served all or any part of his sentence, *shall hereafter*, on appeal or on a new trial or rehearing, be found not guilty of the crime of which he was convicted or *shall hereafter* receive a pardon on the ground of innocence, * * * may, subject to the limitations and conditions here-

> inafter stated, and in accordance with the provisions of the Judicial Code, maintain suit against the United States in the Court of Claims for damages sustained by him as a result of such conviction and imprisonment. [Italics ours.]

The plaintiff, therefore, is plainly not entitled to the relief granted by the statute, inasmuch as the pardon shows on its face that it was granted on March 2, 1933, and the Act was passed on May 24, 1938.

Second, defendant also defends on the ground that the pardon does not contain the recitals called for by this Act of May 24, 1938. This defense is also good. See *Martin Prisament* v. *United States*, 92 C. Cls. 434.

Defendant's motion to dismiss is sustained, and plaintiff's petition is dismissed. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

THE SIOUX TRIBE OF INDIANS, CONSISTING OF THE SIOUX TRIBE OF THE ROSEBUD INDIAN RESERVATION IN THE STATE OF SOUTH DAKOTA; THE SIOUX TRIBE OF THE STANDING ROCK INDIAN RESERVATION IN THE STATES OF NORTH DAKOTA AND SOUTH DAKOTA; THE SIOUX TRIBE OF THE PINE RIDGE INDIAN RESERVATION IN THE STATE OF SOUTH DAKOTA; THE SIOUX TRIBE OF THE CHEYENNE RIVER INDIAN RESERVATION IN THE STATE OF SOUTH DAKOTA; THE SIOUX TRIBE OF THE CROW CREEK INDIAN RESERVATION IN THE STATE OF SOUTH DAKOTA; THE SIOUX TRIBE OF THE LOWER BRULE RESERVATION IN THE STATE OF SOUTH DAKOTA; THE SIOUX TRIBE OF THE SANTEE INDIAN RESERVATION IN THE STATE OF NEBRASKA;

AND THE SIOUX TRIBE OF THE FORT PECK INDIAN RESERVATION IN THE STATE OF MONTANA v. THE UNITED STATES

Sale of Santee Lands, Minnesota, 1861

[No. C-531 (15). Decided March 2, 1942]

On the Proofs

Indian claims; claims canceled and forfeited under the Act of February 16, 1863.—It is *held* that under the provisions of the Act of February 16, 1863, all the claims of the plaintiff bands of Indians against the defendant are canceled and forfeited, and plaintiffs are not entitled to recover in the instant case.

The Reporter's statement of the case:

Mr. Ralph H. Case for the plaintiffs. *Messrs. James S. Y. Ivins* and *Richard B. Barker* were on the brief.

Mr. Raymond T. Nagle, with whom was *Mr. Assistant Attorney General Norman M. Littell*, for the defendant. *Mr. George T. Stormont* was on the brief.

The court made special findings of fact as follows:

1. By an Act of Congress approved June 3, 1920 (41 Stat. 738), it was provided:

> That all claims of whatsoever nature which the Sioux Tribe of Indians may have against the United States, which have not heretofore been determined by the Court of Claims, may be submitted to the Court of Claims with the right of appeal to the Supreme Court of the United States by either party, for determination of the amount, if any, due said tribe from the United States under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds or lands of said tribe or band or bands thereof, or for the failure of the United States to pay said tribe any money or other property due; and jurisdiction is hereby conferred upon the Court of Claims, with the right of either party to appeal to the Supreme Court of the United States, to hear and determine all legal and equitable claims, if any, of said tribe against the United States, and to enter judgment thereon.
>
> SEC. 2. That if any claim or claims be submitted to said courts they shall settle the rights therein, both legal

and equitable, of each and all the parties thereto, notwithstanding lapse of time or statutes of limitation, and any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel, but may be pleaded as an offset in such suits or actions, and the United States shall be allowed credit for all sums heretofore paid or expended for the benefit of said tribe or any band thereof. The claim or claims of the tribe or band or bands thereof may be presented separately or jointly by petition, subject, however, to amendment, suit to be filed within five years after the passage of this Act; and such action shall make the petitioner or petitioners party plaintiff or plaintiffs and the United States party defendant, and any band or bands of said tribe or any other tribe or band of Indians the court may deem necessary to a final determination of such suit or suits may be joined therein as the court may order. Such petition, which shall be verified by the attorney or attorneys employed by said Sioux Tribe or any bands thereof, shall set forth all the facts on which the claims for recovery are based, and said petition shall be signed by the attorney or attorneys employed and no other verification shall be necessary. Official letters, papers, documents, and public records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys of said tribe or bands thereof to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys for the said tribe or bands of Indians.

SEC. 3. That upon the final determination of such suit, cause, or action, the Court of Claims shall decree such fees as it shall find reasonable to be paid the attorney or attorneys employed therein by said tribe or bands of Indians under contracts negotiated and approved as provided by existing law, and in no case shall the fee decreed by said Court of Claims be in excess of the amounts stipulated in the contracts approved by the Commissioner of Indian Affairs and the Secretary of the Interior, and no attorney shall have a right to represent the said tribes or any band thereof in any suit, cause, or action under the provisions of this Act until his contract shall have been approved as herein provided. The fees decreed by the court to the attorney or attorneys of record shall be paid out of any sum or sums recovered in such suits or actions, and no part of such fees shall be taken from any money in the Treasury of the United States belonging to such tribe or bands of

Indians in whose behalf the suit is brought unless specifically authorized in the contract approved by the Commissioner of Indian Affairs and the Secretary of the Interior as herein provided: Provided, That in no case shall the fees decreed by said court amount to more than 10 per centum of the amount of the judgment recovered in such cause.

2. The plaintiffs are the Santee Tribe or Band of Sioux Indians of the Santee Indian Reservation in the State of Nebraska.

3. On June 19, 1858, a treaty was concluded between the United States and the Mendawakanton and Wahpakoota bands of the Dakota or Sioux Indians, now known as the Santee Sioux Indians. This treaty was ratified on March 9, 1859, and proclaimed on March 31, 1859 (12 Stat. 1031).

The pertinent articles of this treaty are as follows:

ARTICLE III. It is also agreed that if the Senate shall authorize the land designated in article two of this agreement to be sold for the benefit of the said Mendawakanton and Wahpakoota bands, or shall prescribe an amount to be paid said bands for their interest in said tract, provision shall be made by which the chiefs and headmen of said bands may, in their discretion, in open council authorize to be paid out of the proceeds of said tract, such sum or sums as may be found necessary and proper, not exceeding seventy thousand dollars, to satisfy their just debts and obligations, and to provide goods to be taken by said chiefs and headmen to the said bands upon their return: *Provided, however*, That their said determinations shall be approved by the superintendent of Indian affairs for the northern superintendency for the time being, and the said payments be authorized by the Secretary of the Interior.

* * * * *

ARTICLE VIII. Such of the stipulations of former treaties as provided for the payment of particular sums of money to the said Mendawakanton and Wahpakoota bands, or for the application or expenditure of specific amounts for particular objects or purposes, shall be, and hereby are, so amended and changed as to invest the Secretary of the Interior with discretionary power in regard to the manner and objects of the annual expenditure of all such sums or amounts which have

> accrued and are now due to said bands, together with the amount the said bands shall become annually entitled to under and by virtue of the provisions of this agreement: *Provided*, The said sums or amounts shall be expended for the benefit of said bands at such time or times and in such manner as the said Secretary shall deem best calculated to promote their interests, welfare, and advance in civilization. And it is further agreed, that such change may be made in the stipulations of former treaties which provide for the payment of particular sums for specified purposes, as to permit the chiefs and braves of said bands or any of the subdivisions of said bands, with the sanction of the Secretary of the Interior, to authorize such payment or expenditures of their annuities, or any portion thereof, which are to become due hereafter, as may be deemed best for the general interests and welfare of the said bands or subdivisions thereof.

By resolution of June 27, 1860 (12 Stat. 1042), in accordance with Article II of the Treaty, the Senate determined that the plaintiff bands possessed a just and valid right to the lands referred to hereinafter in finding 5 and that they be allowed thirty cents per acre therefor.

4. The "just debts and obligations" referred to in Article III of the treaty were amounts due to licensed traders for supplies theretofore furnished the members of the bands on credit. At the time the treaty was negotiated the total amount of these debts was not known, but the chiefs and headmen of the bands estimated that the sum of $70,000 would be sufficient to liquidate them, and that amount was accordingly fixed in the treaty as the amount which could be used for this purpose.

Under instructions from the office of Indian Affairs the superintendent of Indian Affairs for the Northern Superintendency (Cullen) in November, 1860, submitted the matter, in accordance with Article III of the treaty, to the chiefs and headmen for action. On December 3, 1860, the chiefs and headmen notified the superintendent of their determination, which was to the effect that the superintendent make a full examination of all claims presented against them up to the date of the council held by them and that, should $70,000 not be sufficient to pay all claims found to

be due, the surplus be used to pay the amount of the claims over $70,000, the purpose of this request being that they might feel that all their past engagements had been liquidated. Upon receiving this request from the Indians, the traders who had given credit to the Indians since the date of the treaty presented their books and accounts against the Indians up to the date of the council.

Under date of February 13, 1861, Superintendent Cullen advised the Commissioner of Indian Affairs of the result of the council and recommended that the request of the Indians that the balance of the amount referred to in Article III of the treaty over $70,000 be used in payment of their debts, be granted, stating that "should any allowance be made, it is only under the discretionary clause of the treaty as the cases now stand."

Superintendent Cullen had also been instructed to make a careful examination of the debts of the Indians and submit them, with the result of his investigation, to the Indian Office. This was done, and the claims were thereupon thoroughly examined in the Indian Office; and there was found to be due from the Indians—

For debts incurred prior to the treaty of 1858	$102, 290. 92
For debts incurred subsequent to the treaty and prior to the council of 1860	34, 150. 47

5. In the Indian appropriation act of March 2, 1861 (12 Stat. 221, 237), it was provided:

> For payment to the Med-a-wa-kan-ton and Wah-pa-koo-ta bands of the Dakota or Sioux Indians, for their reservation on the Minnesota river in the state of Minnesota containing three hundred and twenty thousand acres, at thirty cents per acre, ninety-six thousand dollars: *Provided*, That the said sum may be paid, at the discretion of the Secretary of the Treasury, in bonds of the United States authorized by law, at the present session of Congress.

6. Following the examination of these accounts in the Indian Office, as shown in Finding 4, the matter was submitted to the Secretary of the Interior for his action as required by the treaty. On May 31, 1861, the Secretary instructed

the Commissioner of Indian Affairs to pay to such claimants as may be willing to accept the same in full satisfaction, their *pro rata* share of the fund specified in the treaty.

Under this authorization, there was paid to the creditors of the plaintiff bands, who accepted payment under protest, in the fiscal years 1861 and 1862 upon their audited accounts the total sum of $69,165.07.

The request of the plaintiff bands that its debts incurred *subsequent* to the treaty and prior to the date of the council in 1860 also be paid was submitted to the Secretary of the Interior on August 8, 1861, and the Secretary by letter dated August 27, 1861, directed the payment of these debts. Thereupon these debts, amounting to $34,150.47, were paid *pro rata* to the extent of $25,954.35 in the fiscal year 1862.

In the fiscal year 1863 there was paid out of this appropriation of $96,000, on account of obligations incurred by the plaintiff bands during the period of their removal from the State of Minnesota, the sum of $880.58. This payment exhausted the appropriation of $96,000 in the act of March 2, 1861, and left a balance of approximately $42,000 unpaid upon the claims audited in 1860.

7. In a letter dated June 13, 1870, addressed to the Speaker of the House of Representatives, the Secretary of the Interior stated among other things that it had been ascertained by the Indian Department that after the payment of the amount provided by the treaty to satisfy the indebtedness of the Indians at the date of the treaties, a balance of $57,616.35 remained against them and that there was also due by the Lower bands of Sioux Indians the sum of $8,196.12 "being a balance of claims against them arising subsequent to the treaty of 1858."

He also stated that he was satisfied the claims were probably just and should be paid but that the department had no funds for that purpose and suggested that Congress make an appropriation out of $65,812.47 for the payment thereof.

Subsequently, a bill (H. R. 420), appropriating an additional sum of $70,000 for this purpose was introduced in the House of Representatives accompanied by a report which recited the steps taken by the Secretary of the In-

terior and Commissioner of Indians Affairs in disbursing the appropriation of $96,000 carried in the act of March 2, 1861.

With full knowledge of the manner of the disbursement of the $96,000, Congress passed a bill which became the act of May 16, 1874, which provided for the payment by the Secretary of the Interior "all obligations of the United States to the creditors of the Upper and Lower Bands of Sioux Indians, arising under the treaty of June nineteenth, eighteen hundred and fifty-eight, between said bands and the United States" and appropriating $70,000 or so much as may be necessary to carry the provisions of the bill into effect.

Out of this appropriation of $70,000, there was paid on behalf of the plaintiff bands the following amounts:

Payment to creditors of balance due for obligations incurred prior to treaty of June 19, 1858	$33, 640. 81
Payment to creditors of balance due for obligations incurred subsequent to treaty of June 19, 1858, and prior to date of council held by Superintendent Cullen, Northern Superintendency, December 3, 1860	8, 196. 12
Clerical services in connection with settlement of creditors' claims	250. 00
Total	42, 086. 93

8. The defendant has not paid the plaintiffs anything out of the $96,000 originally appropriated in payment for their lands, or the $70,000 which the United States was authorized to pay to the creditors of the plaintiffs in compromise and settlement of their claims.

9. Under authority of the act of Congress of June 3, 1920, *supra*, the plaintiffs, which constitute the Sioux tribe named therein, through their duly authorized attorneys, filed their petition in this Court on May 7, 1923, alleging among other things a right of recovery for and on behalf of the Santee band of Sioux Indians of the Santee Indian Reservation in the State of Nebraska, upon the cause of action now before the Court. On June 11, 1934, with leave of the

Court, a separate amended petition, alleging solely the present cause of action, was filed.

10. By the act of February 16, 1863 (12 Stat. 652), Congress declared, in part, as follows:

> Whereas the United States heretofore became bound by treaty stipulations to the Sisseton, Wahpaton, Medawakanton, and Wa[h]pakoota bands of the Dakota or Sioux Indians to pay large sums of money and annuities, the greater portion of which remains unpaid according to the terms of said treaty stipulations; and whereas during the past year the aforesaid bands of Indians made an unprovoked, aggressive, and most savage war upon the United States, and massacred a large number of men, women, and children within the State of Minnesota, and destroyed and damaged a large amount of property, and thereby have forfeited all just claim to the said moneys and annuities to the United States; and whereas it is just and equitable that the persons whose property has been destroyed or damaged by the said Indians, or destroyed or damaged by the troops of the United States in said war, should be indemnified in whole or in part out of the indebtedness and annuities so forfeited as aforesaid: Therefore—
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all treaties heretofore made and entered into by the Sisseton, Wahpaton, Medawakanton and Wahpakoota bands of Sioux or Dakota Indians, or any of them, with the United States, are hereby declared to be abrogated and annulled, so far as said treaties or any of them purport to impose any future obligation on the United States, and all lands and rights of occupancy within the State of Minnesota, and all annuities and claims heretofore accorded to said Indians, or any of them, to be forfeited to the United States.

The court decided that the plaintiffs were not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

This case is begun under an Act of Congress set out in finding 1 giving the Sioux Tribe of Indians the right to submit any claims which it may have against the United

States to this court notwithstanding the lapse of time or statutes of limitation, and providing that the claim or claims of the tribes or bands thereof may be presented separately or jointly by a petition.

The plaintiffs are the Santee Tribe and are a band of the Sioux Indians of the Santee Reservation in the State of Nebraska.

The Treaty of June 19, 1858, between the United States and the Santee Indians, provided among other things that if the Senate should authorize certain lands to be sold for the benefit of the Mendawakanton and Wahpakoota bands or prescribe the amount to be paid said bands for their interest in said tract, provisions shall be made by which the chiefs and headmen of said bands may, in their discretion, in open council, authorize to be paid out of the proceeds of said tract not exceeding $70,000 to satisfy their just debts and obligations.

By the Act of March 2, 1861, Congress appropriated the sum of $96,000 in payment for 320,000 acres of land in the State of Minnesota belonging to the Santee bands of Sioux Indians at the rate of 30 cents per acre and provided that this sum might be paid at the discretion of the Secretary of the Treasury in bonds of the United States.

The defendant has never paid or in any way accounted for the difference between the sum of $96,000 appropriated in payment for the Indian lands and the $70,000 which the United States was authorized to pay the creditors of the plaintiffs. Plaintiffs now ask judgment for $26,000 together with interest thereon by reason of the failure of the defendant to make this payment.

Several defenses are presented to this claim. The first is that this balance of $26,000 and more was paid to the creditors of the Indians in accordance with their request as shown by findings 4 and 6 and, as the use of this balance for the purpose shown was at the request of the plaintiff bands, the defendant argues that plaintiffs are thereby estopped to question its validity and that even if the use of the balance indicated had been improper, it was subse-

quently ratified and confirmed by the Act of May 16, 1874, as shown by finding 7.

Plaintiffs contend that under the provisions of Article 3 of the Treaty of 1858 not more than $70,000 could be paid out of their fund upon their debts to the traders and that, when and if that $70,000 was used up, the residue of $26,000 of the appropriation of $96,000 in 1861 (12 Stat. 221, 237), in payment for certain land, belonged to the plaintiffs and could not be used by the Secretary of the Interior to pay any debts of the plaintiff bands. We do not find it necessary to discuss or decide this question.

By the Act of February 16, 1863, Congress declared that the plaintiff bands of Indians and other bands of the Dakota or Sioux Indians had "during the past year * * * made an unprovoked, aggressive, and most savage war upon the United States and massacred a large number of men, women, and children within the State of Minnesota and destroyed and damaged a large amount of property" and thereby forfeited all just claim to any money unpaid them; also, that all treaties purported to impose any further obligation on the United States and all lands and rights of occupancy within the State of Minnesota "are hereby declared to be abrogated and annulled," so far as they purport to impose any future obligation on the United States, and all lands and rights of occupancy within the State of Minnesota, and all annuities and claims heretofore accorded to said Indians, or any of them, to be forfeited to the United States. See finding 10 for the statute in full.

It is quite clear that by the statute referred to above, all claims of the plaintiffs are cancelled and forfeited.

Judgment must, therefore, be entered dismissing plaintiffs' petition and it is so ordered.

MADDEN, *Judge;* JONES, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

Syllabus

THE SIOUX TRIBE OF INDIANS, CONSISTING OF THE SIOUX TRIBE OF THE ROSEBUD INDIAN RESERVATION IN THE STATE OF SOUTH DAKOTA; THE SIOUX TRIBE OF THE STANDING ROCK INDIAN RESERVATION IN THE STATES OF NORTH DAKOTA AND SOUTH DAKOTA; THE SIOUX TRIBE OF THE PINE RIDGE INDIAN RESERVATION IN THE STATE OF SOUTH DAKOTA; THE SIOUX TRIBE OF THE CHEYENNE RIVER INDIAN RESERVATION IN THE STATE OF SOUTH DAKOTA; THE SIOUX TRIBE OF THE CROW CREEK INDIAN RESERVATION IN THE STATE OF SOUTH DAKOTA; THE SIOUX TRIBE OF THE LOWER BRULE RESERVATION IN THE STATE OF SOUTH DAKOTA; THE SIOUX TRIBE OF THE SANTEE INDIAN RESERVATION IN THE STATE OF NEBRASKA; AND THE SIOUX TRIBE OF THE FORT PECK INDIAN RESERVATION IN THE STATE OF MONTANA *v.* THE UNITED STATES OF AMERICA

Sale of Santee Lands, Minnesota, 1863

[No. C-531 (16). Decided March 2, 1942]

On the Proofs

Indian claims; distribution of proceeds from sale of lands under the Act of July 15, 1870, a discharge in full.—It is *held* that the distribution to the Medawakanton and Wahpakoota Bands of Indians of proceeds from the sale of reservation lands of the Sioux Tribe, upon the basis of determination by the Secretary of the Interior with respect to the population of the respective bands under the provisions of the Act of July 15, 1870, was a discharge in full of defendant's obligation to plaintiffs under the Acts of March 3, 1863, and July 15, 1870; and plaintiffs accordingly are not entitled to recover.

Same; res judicata.—The decision of the Court of Claims in the case of *Medawakanton and Wahpakoota Bands of Sioux Indians* v. *The United States*, 57 C. Cls. 357, in which the court did not undertake to make a division of the funds there involved according to the precise number of people in each band, as required in the instant case under the provisions of the Act of July 15, 1870, is not *res judicata* of the issues in the instant case.

The Reporter's statement of the case:

Mr. Ralph H. Case for the plaintiff. *Messrs. J. S. Y. Ivins* and *Richard B. Barker* were on the briefs.

Mr. George T. Stormont, with whom was *Mr. Assistant Attorney General Norman M. Littell*, for the defendant. *Mr. Raymond T. Nagle* was on the brief.

The court made special findings of fact as follows:

1. This suit is brought by the Sioux Tribe of Indians for the use and benefit of the Medawakanton and Wahpakoota bands, which are bands of the Sioux Tribe of the Santee Indian Reservation of the State of Nebraska. Previously a suit had been brought on May 7, 1923, under the authority of the Act of June 3, 1920 (41 Stat. 738), on behalf of the Sioux Tribe of Indians, including, among other bands, the Sioux Tribe of the Santee Indian Reservation in the State of Nebraska. The petition was designated on the records of the court as C–531. On February 26, 1934 this court entered an order allowing the several bands of the Sioux Tribe of Indians to file separate amended petitions in case No. C–531, and pursuant thereto the present petition was filed on June 11, 1934.

2. The Medawakanton and Wahpakoota bands, together with the Sisseton and Wahpeton bands, were known as the Minnesota or Mississippi Sioux.

3. In August of 1862 there was an outbreak of Sioux Indians in Minnesota, consisting of the four bands above named, during which a large number of white settlers were massacred and a great amount of property destroyed. In consequence of this outbreak Congress by the Act of February 16, 1863 (12 Stat. 652), abrogated and annulled all treaties between said bands of Indians and the United States, so far as said treaties purported to impose any future obligation on the United States, and declared all lands and rights of occupancy accorded to said Indians within the State of Minnesota to be forfeited to the United States. The Act further provided for the payment of damages suffered by citizens in said outbreak out of the funds in the hands of the Government belonging to said bands.

However, shortly thereafter, to wit, on March 3, 1863 (12 Stat. 819), Congress passed an act providing for the removal of these bands from the reservations they were then occupying, and for the sale of the lands included in these reservations, and for the use of the money realized therefrom for the benefit of the Indians of these bands.

The sale began in 1865 and continued over a long period of time. The total proceeds derived therefrom amounted to $950,063.71.

4. By Act of July 15, 1870 (16 Stat. 335, 361), the Act of March 3, 1863 (12 Stat. 819), was amended in part as follows:

> SEC. [7.] *And be it further enacted*, That the act approved March three, eighteen hundred and sixty-three, entitled "An act for the removal of the Sisseton, Wahpeton, Medawakanton, and Wahpakoota bands of Sioux or Dakota Indians, and for the disposition of their lands in Minnesota and Dakota" be so amended as to make the proceeds of the sale of the reservations in said act ordered to be sold applicable alike to all the reservations upon which Medawakanton and Wahpakoota and Sisseton and Wahpeton have been or may hereafter be located.
>
> SEC. [8.] *And be it further enacted*, That said proceeds shall be distributed and paid equitably to the said Indians in proportion to their numbers, under the direction of the Secretary of the Interior, and in accordance with existing laws: *Provided*, That this provision shall apply only to the funds to be hereafter distributed.

5. Pursuant to the requirements of the Act of July 15, 1870 (16 Stat. 335, 361), the Secretary of the Interior made distribution of their portion of the proceeds from the sale of said lands to the Medawakanton and Wahpakoota Bands of Indians, upon the basis of determinations by the Secretary with respect to the population of the respective bands.

According to said determinations, from July 15, 1870 to June 30, 1871 the total population of the four bands was 3,012, of which total the plaintiff bands composed 974; from July 1, 1871 to June 30, 1872 the total population of the four bands was 3,145, of which total the plaintiff bands composed 987; and from July 1, 1872 to June 30, 1907 the plaintiff

bands composed two-sevenths of the total population of the four bands.

From the aggregate of $950,063.71, proceeds of the sale of said lands, $327,850.83 was disbursed for the benefit of the plaintiff bands of Sioux Indians.

6. The defendant has fully discharged its obligation to plaintiffs under the acts of March 3, 1863 and July 15, 1870.

The court decided that the plaintiffs were not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

This is a suit to recover what plaintiffs claim is their proportionate part of the proceeds of the sale of certain lands in Minnesota. The defendant has paid to them what it thinks is their proper proportion, but plaintiffs say they are entitled to a larger proportion than has been paid them.

The act of July 15, 1870, which amends the act of March 3, 1863 providing for the sale of these lands, specified that the proceeds of the sale "shall be distributed and paid equitably to the said Indians in proportion to their numbers * * *."

Of the total of $950,063.71 realized from the sale of the lands, the sum of $327,850.83 has been paid to plaintiffs, which is a little more than 34 percent. The bands entitled to share in these proceeds were the plaintiffs (the Medawakanton and Wahpakoota bands) and the Sisseton and Wahpeton bands. The reports of the Commissioner of Indian Affairs show that the plaintiff bands comprise about 33 percent of the total population of the four bands. In 1870 they comprised 32.7 percent of the total population; in 1871, 31.4 percent; in 1872 something over 30 percent. It would appear that the Indians have received their just proportion of the proceeds of the sale of these lands.

The plaintiffs, however, say that we are foreclosed from inquiring as to what is the proper proportion by reason of our decision in the case of *Medawakanton and Wahpakoota Bands of Sioux Indians* v. *The United States*, 57 C. Cls. 357. There is no basis for this contention. The decision in that

case is not *res judicata* here because the issue between the parties was not the same as the issue here. That suit was brought to recover the amount of certain annuities which had been forfeited previously. From the amount of annuities found to be due, the court was directed to set off any amount paid these four bands of Indians subsequent to abrogation of the treaties with them. Some of the items to be offset consisted of amounts paid to compensate for depredations committed by these four bands of Indians, payments of their debts to traders, payments to members of their tribe who had served in the forces of defendant as scouts and soldiers, and also payment for their support. The court took one-half of the total sum spent for the above purposes for the benefit of the four bands, and offset this amount against the amount due plaintiff bands for annuities.

The plaintiffs say that this was a determination that the plaintiff bands were entitled to one-half of whatever amount was payable to the four bands. This does not follow. The Act here in question expressly directed that the proceeds of the sale of these lands be distributed among the Indians according to population. The court in the case reported in 57 C. Cls. 357, was not proceeding under this statute or a similar one. So far as is known, there was no proof before the court in that case as to the population of the several bands, nor was this proof necessarily essential in order to determine the proportion of the aggregate payments to be charged against each band on account of most of the items mentioned above. Although the Sisseton and Wahpeton bands may have been more populous than the plaintiff bands, still, the plaintiffs may have committed more depredations, and plaintiffs may have been more heavily indebted to traders, and more of plaintiffs' members might have been scouts and soldiers. The only item that has relation to population is the payments for support of the bands. No doubt, the greater the population of the different bands, the more was spent for their support. But it is evident from a reading of the opinion in that case that the court did not undertake to make a division according to the precise number of people in each band. It adopted the rough rule, under all the circumstances of that case,

of charging one-half to the plaintiff bands and one-half to the Sisseton and Wahpeton bands. Certainly, that did not amount to a determination of what was a proper division under an act requiring the division to be made "in proportion to their numbers."

It would appear that the plaintiffs have been paid their due proportion of the proceeds of the sale of the lands in question and, therefore, they are not entitled to recover. Their petition will be dismissed. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

HAZEN C. PRATT v. THE UNITED STATES

[No. H-328. Decided March 2, 1942]

On the Proofs

Patents; validity; infringement.—United States letters patent No. 1490472, for "Airplane Landing Mechanism," *held* invalid and not infringed by the United States.

Same; anticipation.—Claims 1, 15, and 16 of the Pratt patent in suit filed July 14, 1922, are readable upon the disclosure of the British patent to Whiteway, No. 132092, filed October 4, 1918.

Same.—The disclosures of claims 2, 3, and 9 of the Pratt patent in suit are a combination of Le Mesurier's arm and hook (U. S. No. 1315320, filed June 10, 1919) with Whiteway's point of attachment and do not amount to invention.

Same.—Claims 12, 13, and 14 of the Pratt patent in suit, involving the use of a universal connection between the plane and the rod, are anticipated by the Whiteway and Le Mesurier patents.

Same.—The proof shows that the supposed merit of plaintiff's invention, which was the slowing down of a plane while it was still in the air, in order to land it, has not been well regarded by the defendant and plaintiff has not shown that it has been adopted by others.

Same.—The monopoly of a patent does not cover another device, constructed in good faith to operate upon a principle different from that involved in and intended by the patent, merely because it is impossible or impracticable to construct the other device so that it can be operated without inadvertently or unskillfully, upon occasion, infringing upon the outside boundaries of what might seem literally to be within the patent.

Same.—In the instant case it would not be a proper application of the purpose of the patent laws to construe plaintiff's assumed patent for a device to retard the speed of a plane while still in flight so broadly as to prevent the development and use by others of a device to stop the roll of a plane after it has touched the landing surface.

Same.—It is *held* that all of plaintiff's claims are invalid as having been anticipated.

Same.—It is *held* that plaintiff's claim to a device attached in the rear of the center of gravity and so disposed as to exert a retarding force in approximate fore and aft horizontal alinement with the center of gravity of the plane, in order to retard the speed of the plane while still in flight, was not infringed by the defendant.

The Reporter's statement of the case:

Mr. Edward H. Cumpston for the plaintiff.

Mr. Samuel E. Darby, Jr., with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Paul P. Stoughtenburgh* was on the brief.

In this case the court on February 8, 1937, rendered an opinion holding United States letters patent No. 1499472 to be valid and infringed by the Government; and upon defendant's motion for new trial said motion was overruled July 6, 1937, and the opinion theretofore rendered was amended; interlocutory judgment was rendered October 4, 1937 (85 C. Cls. 1).

Defendant's petition for writ of certiorari was denied by the Supreme Court November 22, 1937 (202 U. S. 750; 85 C. Cls. 711).

On July 1, 1939, there was filed motion of defendant for leave to file motion for new trial under Section 175 of the Judicial Code, which motion was granted and said motion for new trial, filed November 15, 1939, was granted December 4, 1939, and an order entered suspending the accounting proceedings and referring the case to a commissioner of the court, with leave to defendant to present evidence regarding the patents, publications, and uses specifically listed in said motion and directed to the effect of same on claims 1, 2, 3, 9, 12, 13, 14, 15, and 16 previously held by the court to be valid and infringed; and defendant was also authorized to

present additional evidence as to the method or methods of landing, and apparatus employed by the United States for the purpose, within a period of six years prior to the filing of the petition in this case; and plaintiff was authorized to present evidence in rebuttal.

Upon the report of the commissioner and reargument of the case, decision was rendered March 2, 1942, vacating the previous findings of fact, conclusion of law, and opinion.

The court, on March 2, 1942, made special findings of fact as follows:

1. This suit is brought by Hazen C. Pratt, a citizen of the United States and a resident of Rochester, New York, for alleged infringement of United States letters-patent to him, No. 1499472 for "Airplane Landing Mechanism," patented July 1, 1924, on an application filed July 14, 1922. A certified copy of the Patent Office file wrapper and contents of the patent in suit is in evidence as plaintiff's exhibit F and is made a part of these findings by reference.

2. Plaintiff at the time of filing his petition herein was the owner of the entire right, title, and interest in and to the patent in suit and to all rights of recovery thereunder.

3. The airplane was recognized at a date early in its development as a useful military weapon and by 1917 the Navy had begun to investigate the possibilities of the use of land planes in naval operations. It was possible in calm weather and with a calm sea for a seaplane to be lowered from the mother ship to the water, to take off from the water, and to return and land upon the water near the ship and then be hoisted aboard, but even a comparatively small disturbance of the sea was sufficient to render this difficult and dangerous. Moreover, in battle it is frequently impracticable for a ship under way to stop to pick up planes. The method of launching seaplanes from catapults did not solve the problem, because it was still necessary for the seaplane to land on the water and be recovered by the ship. It was recognized that land machines were superior in speed, range, and other features of performance and usefulness to seaplanes, and the aim of the Navy was to utilize land planes operating from the deck of a ship.

This desired operation presented many problems. The problem of landing in the restricted area of a ship's deck was difficult, and additional difficulties were presented by the disturbance of the air created by the ship's movement, the discharge of combustion gases from its power plant, and the roll and pitch of the deck, all of which factors were variable. The pilot had to be able to fly through more or less turbulent air and to follow more or less the roll and pitch of the moving deck and still achieve a landing in an extremely restricted area.

4. Prior to July 14, 1922, the filing date of plaintiff's patent application which matured into the patent in suit, the Navy had produced no satisfactory solution of this problem, and was still conducting experiments.

In 1919 the United States Navy had no airplane carriers. The British Navy then had at least one. American naval officers realized that the development of aircraft carriers was desirable, although many officers were skeptical of the possibility of successfully landing airplanes on carriers. In that year Congress appropriated funds for the conversion of the collier *Jupiter* into an aircraft carrier, which was subsequently renamed the *Langley*. The *Langley* was intended primarily to be used for experimental purposes and the training of personnel.

For the purpose of trying out various methods of arresting airplanes in a restricted landing area, an experimental landing platform or "dummy deck" was built on land at Hampton Roads in the summer of 1920, but it was built on soft ground and settled so badly that it had to be rebuilt. The rebuilding was not completed until late in 1921. On this platform a number of different forms of airplane arresting apparatus were constructed and tested.

The *Langley* was commissioned March 20, 1922, at which time the experimental activities were transferred from the "dummy deck" at Hampton Roads to the *Langley*. Many of the devices tried were found to be impractical or inoperative and were abandoned.

5. The patent in suit discloses mechanism for hooking an airplane while in flight to a stationary arresting apparatus,

which applies a gradual retarding force to the airplane, lands it, and brings it to a stop in a very short distance.

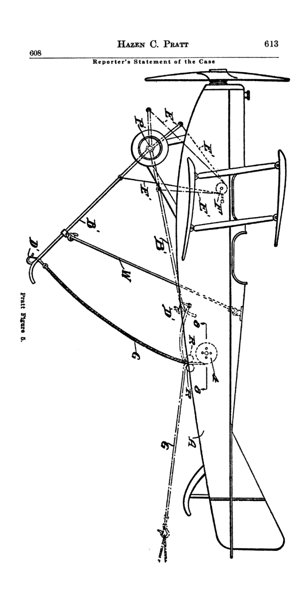
The mechanism consists of two cooperating parts—one carried by the airplane, the other mounted upon the landing area, which the patent states may be a ship's deck. The mechanism at the landing area will hereafter be referred to as the "landing-area mechanism" and that upon the aircraft as the "airplane mechanism."

The landing-area mechanism comprises an arresting cable wound on a drum or drums and passing through pulleys and having a portion stretched transversely across the landing area and elevated above the surface thereof. The drum or drums upon which the cable is mounted are rotatable to pay out a limited amount of cable, but their rotation is resisted by springs.

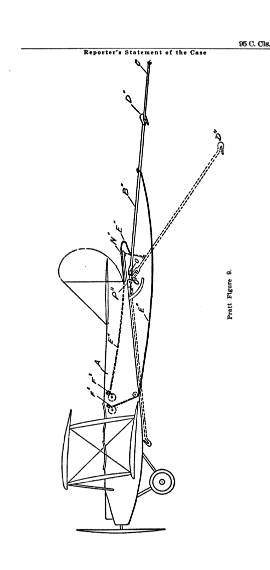
The airplane mechanism consists of a pole mounted below the fuselage of the airplane and extending longitudinally thereof, pivoted at one end, having the other end releasably held against the fuselage so that the free end may be dropped to a predetermined position well below the landing gear, this being the position for engaging the arresting cable. When the pole is in landing position it extends obliquely downwardly from the airplane, with its lower end projecting some distance below the bottom of the landing wheels.

On the aft end of the pole in landing position there is a stout hook, and a connection is provided from the hook to the airplane fuselage at a point some distance in the rear of the center of gravity of the airplane and approximately in fore-and-aft alinement therewith.

In one form of the invention (Pratt, fig. 5, reproduced herewith) the hook *D′* is removably held on the pole *B′* and is detached from the pole when it hooks on to the arresting cable, and the arresting force is transmitted from the detached hook to the fuselage by a cable *G*. In another form (Pratt, fig. 9, reproduced herewith) the hook *D″* is not detachable, and the pole *B″* itself serves to transmit the retarding force to the fuselage at a point in the rear of the center of gravity of the airplane and approximately in fore-and-aft alinement therewith.



Pratt Figure 5.



Pratt Figure 9.

In making a landing with the apparatus disclosed in the patent in suit, the pilot flies toward the arresting gear and drops the free end of the pole, which, after being dropped, is in position to strike the arresting cable. The pilot flies sufficiently low so that the pole will strike the arresting cable as the airplane crosses it, whereupon the cable is guided by the pole into the hook and, as the airplane flies on, the arresting cable is paid out against the force of the retarding springs. The retarding force so applied gradually reduces the speed of the airplane without any substantial tendency to tilt or upset it, and as its speed diminishes it sinks to the landing surface and stops. The retarding force is greater the greater the speed and weight of the machine and the shorter the landing run desired, other things being the same.

The application of the retarding force to the plane below the center of gravity would introduce a positive force, tending to cause the plane to nose over, this nosing-over force being the greater the heavier the airplane, the greater the speed at the time of hooking on, and the farther below the center of gravity the retarding force is applied, other things being the same. When the force is applied in the rear of the center of gravity and approximately in fore-and-aft alinement therewith, not only is there no force introduced tending to tip the plane, but should such a force be introduced for any reason, such, for instance, as by the landing wheels striking an obstruction, the retarding force applied by the arresting cable tends to hold the tail down and prevent nosing over. Similarly, should the plane tend to be slued around, as by only one landing wheel striking an obstruction, or by a cross wind, the force applied by the arresting cable tends to straighten the machine out and hold it in proper alinement.

6. Prior to the date of filing his patent application, which matured into the patent in suit, plaintiff had devoted much time and thought to the problem of landing airplanes in a restricted area. He was acquainted not only with the theoretical aspects of the problem, but with certain of its practical aspects as well. He had been trained as a naval aviator, commissioned and been made a flying instructor, and his experience included operation of both seaplanes and land planes. During the summer of 1918 he was injured in an airplane crash and later

discharged from the service for resulting physical disability, and returned to Massachusetts Institute of Technology to complete his course, graduating in 1922 after specializing in the study of aviation and related subjects. He received compensation for his disability, and part of his college expenses after his discharge was paid by the Veterans' Bureau as compensation.

7. The apparatus disclosed in figure 5 of the patent in suit was conceived by plaintiff at least as early as March 18, 1920. It was shown in a sketch dated March 11, 1920, and was disclosed to others by May 18, 1920, and shown and described in his first patent application, filed on that date, serial no. 382324. Among others, the invention was disclosed to Commander Westervelt, then manager of the Naval Aircraft Factory in Philadelphia. Commander Westervelt recommended a demonstration to the Navy.

8. Plaintiff during the summer of 1920 began the construction and assembly of apparatus required for actual tests of his idea. By August 1920 he had completed it as far as it was possible for him to go without an airplane upon which to install it. His means were not sufficient to purchase an airplane and so he set about obtaining the use of a Navy plane. On August 27, 1920, he interviewed Commander J. C. Hunsaker, disclosed his sketch of March 11, 1920, described his idea, and requested authorization to use a Navy airplane and flying field facilities to test it in actual flight. This the Navy promptly agreed to do, provided that plaintiff would fly the airplane in the tests, to which plaintiff assented. The Navy furnished plaintiff blueprints of an "Aëromarine 39B" airplane, and plaintiff then made the necessary additions to his apparatus to fit it to the airplane, and shipped the apparatus to the Naval Air Station at Anacostia, D. C., where he supervised the determination of the location of the center of gravity of the airplane and the application to it of his arresting gear substantially as shown in figure 5 of the patent in suit. After the apparatus was nearly ready for test, a fire occurred on October 16, 1920, destroying the hangar and the airplane on which the apparatus was installed, and damaging the apparatus.

The Navy agreed to repair the damage at the Naval Aircraft Factory at Philadelphia and plaintiff shipped his apparatus there. Delays were encountered and plaintiff made a number of trips to the Naval Aircraft Factory for the purpose of expediting the work. These trips were made during such times as plaintiff was able to absent himself from his studies at Massachusetts Institute of Technology. During these trips plaintiff explained his apparatus to various people, including Lieutenants Barnaby and Fellers of the Navy.

November 15, 1920, Lieutenant Fellers wrote plaintiff suggesting certain changes in the apparatus. On November 22, 1920, a letter was written by the Naval Aircraft Factory to the Bureau of Construction and Repair, inclosing photographs of plaintiff's landing gear and referring to changes in details.

December 14, 1920, Lieutenant Fellers, in the presence of plaintiff, dictated a report entitled "Pratt Arresting Gear," describing certain proposed changes, and a sketch was attached to the report illustrating such changes. In this report it was suggested that plaintiff's apparatus was not believed to be new because of certain British experiments and because of certain work by Captain Mustin, but no claim was made that any of the Navy personnel had made any inventive contribution to plaintiff's system.

The Bureau in an order dated January 7, 1921, entitled "Pratt Arresting Gear," directed that Pratt's apparatus be repaired in its original form and that alternative apparatus be constructed to embody the changes suggested in the report of December 14, 1920. This alternative apparatus was never used. Plaintiff himself constructed another alternative apparatus and shipped it to the naval air station, but that alternative apparatus was never used. By September 1921 the repaired arresting gear was ready for flight tests and was substantially that shown by figure 5 of the patent in suit.

9. The first flight test occurred on September 15 or 16, 1921, when plaintiff flew the airplane equipped with his arresting gear into the stationary retarder. The airplane was flown over the arresting cable with the pole lowered so that the hook projected well below the landing gear. The hook en-

gaged the arresting cable satisfactorily and the airplane was landed and its speed retarded to about 10 miles an hour, when a defective cable connection parted. Plaintiff then returned to Cambridge, Massachusetts, to continue his studies, and on October 11, 1921, resumed the testing. In these resumed tests, during an attempted landing, a defect developed in the brakes intended to resist the paying out of the arresting cable, the cable ran out free, tangled and broke, and the plane overturned, suffering some damage. After repairs to the plane, tests were resumed on October 19, 1921, when, after several unsuccessful attempts in which the pilot was unable to engage the arresting cable with the hook, a successful hooking on was accomplished with the plane in flight at a speed of about 45 miles an hour, and the plane was landed and brought to a stop as intended in a distance of 132 feet after hooking on, the brakes being applied for the last 107 feet.

10. A written description of the tests was made by plaintiff concurrently and witnessed by persons assisting in them, which description was supplemented by photographs and is in evidence as plaintiff's exhibit J, made a part hereof by reference.

11. An official report of the tests was made by Commander Stone to the Navy Department, but Commander Stone did not recommend the Pratt gear because of the fact that hooking on was accomplished with the plane in flight. Commander Stone recommended that hooking on should not occur until after the plane had reached the ground, and criticized certain features of the apparatus.

12. It is not proved that the Navy, or any of its personnel associated with Pratt in the tests, made any inventive contribution to the Pratt system, or that they had anything to do with the development of the Pratt system other than furnishing the airplane and flying facilities to Pratt and repairing the apparatus damaged by the fire.

13. On May 18, 1920, plaintiff filed an application, serial no. 382324, in the United States Patent Office. This application was prosecuted to allowance on April 6, 1921, with 10 claims substantially identical with claims 1 to 10 of the pat-

ent in suit and with a disclosure of figures 1 to 8 substantially identical with those of the patent in suit. This application, after being successfully prosecuted to allowance, was forfeited for failure to pay the final fee.

14. Subsequently, on July 14, 1922, plaintiff filed a renewal application embodying, in addition to figures 1 to 8 of the original application, figures 9 and 10 of the patent in suit and additional claims. This new application was prosecuted to allowance and matured into the patent in suit on July 1, 1924. On October 17, 1925, plaintiff wrote to the Bureau of Aeronautics, calling attention to his demonstration, and requested information as to the attitude of the Bureau toward compensating him.

Plaintiff subsequently in letters during the period November 1925 to June 1926 notified the Navy of the issue of his patent and charged that the Navy was infringing it; the Navy's view, as set forth in its replies, was that no valid claims of the patent had been infringed; thereafter plaintiff filed his petition in this court.

15. The mechanism installed upon the landing area on the deck of the *Langley* and used during the time in suit comprised a number of longitudinal cables arranged in parallel relation about 18 inches apart and supported at a height of 14–16 inches above the deck, a distance slightly less than the radius of the landing wheels, by "fiddle bridges," thin wooden strips which normally held the longitudinal cables at the desired height, but which when struck by the landing wheels of a plane were knocked down and offered no obstacle to the roll of the plane.

Immediately below the longitudinal cables were cables stretched transversely across the deck. The ends of each adjacent pair of cables were attached to other cables which in turn passed over pulleys in the deck down into the hold of the ship where there were weights mounted in towers in such a way that when the transverse cable was engaged and pulled forward, the attached cables picked up the weights, applying a progressively retarding force to the transverse cable.

16. A drawing entitled "General Type Plan Airplane Arresting Gear Equipment" dated June 7, 1926, introduced in

evidence as defendant's exhibit 12 and made a part hereof by reference, shows the arresting gear used by the Navy which is charged to infringe plaintiff's patent. The alleged infringing structure is that shown as "Type A" and was used on airplane types FB-5, F6C-2, and M-74. The mechanism consisted of a pole pivotally mounted on the airplane fuselage and terminating at its aft end in a hook. The pole could be raised and lowered under the control of the pilot. When raised it lay substantially along the bottom of the fuselage and had only a limited lateral movement. When lowered the pole and hook extended obliquely backward and downward with its lower end extending below the plane of the bottom of the landing wheels and tail skid, for engagement with the transverse cables. The plane was also provided with axle hooks for engagement with the longitudinal cables to guide the plane longitudinally on the deck and to prevent its yawing and going over the side of the ship.

The landing method used by the defendant may be described as follows:

The carrier was headed into the wind and maintained at a definite speed to produce a normal air speed longitudinally of the deck of approximately 25 miles per hour.

The pilot approached the stern of the carrier to a point astern the vessel where he came under the direction of the Flight Deck Officer, from which point on he controlled the position and attitude of his plane under the direction of that officer. The Flight Deck Officer then, by means of visual signals, instructed the pilot to increase or decrease the speed of approach and elevation and attitude of the airplane relative to the deck of the carrier, until a certain position aft of the stern was reached. At this point the airplane was put in a tail down attitude such that as the airplane came down to the deck the wheels and tail skid would contact the deck in a normal 3-point landing attitude in the approximate location of the second transverse cable, about 60 feet from the stern of the vessel. If the Flight Deck Officer was not satisfied that the pilot had reached the desired point astern of the vessel, he waved the pilot away to make a better approach.

When the airplane reached the position desired by the

Flight Deck Officer, the pilot cut his throttle and brought his plane in for a 3-point landing on the deck in the same manner as he would upon the ground.

In the usual and most desirable landing the trailing hook on the plane passed over the first transverse cable without engagement, contacted the deck, and then dragged along the deck into engagement with the second transverse cable, the axle hooks in the meantime engaging the longitudinal cables which maintained the airplane in a straight forward direction along the ship, and prevented yawing and plunging over the side.

The wheels and tail skid may have contacted the deck before the wheels passed the transverse cable which was to be engaged, in which case the wheels rode down that cable which was mounted in such a way as to permit it to rise again for engagement with the trailing hook. The wheels and tail skid may have contacted the deck astraddle the transverse cable, or the wheels and tail skid may have contacted the deck just after the hook engaged the transverse cable.

In the apparatus used by the United States there was no retarding force exerted at the instant when the trailing hook engaged the transverse cable nor was any exerted until the cable was deflected into a V and drawn out to a point where the connecting cable began to pick up the weights in the hold of the vessel.

The airplane continued its roll along the deck for a distance of some 50 feet in a tail-down attitude with a retarding force (progressively increasing to a predetermined value and thereafter remaining constant) applied thereto from the transverse cable which was located below the longitudinal cables (14–16 inches off the deck) while the center of gravity of the airplane was some 5 feet above the deck.

The major portion of the retarding force was applied to the trailing hook by the transverse cables located and retained by the longitudinal cables at an elevation below the axle of the airplane, i. e., 14–16 inches above the deck as distinguished from 4–5 feet, the elevation of the center of gravity of the airplane above the deck. The retarding force applied to the airplane by the engagement of the axle hooks with the longi-

tudinal cables varied from a negligible amount to as much as 15% of the total retarding force applied to the airplane.

The hook, while in attachment with the arresting cable, lay at an angle of approximately 24 degrees below horizontal.

The application of the retarding force 14 inches off the deck tended to cause the tail to rise. This tendency was opposed by the other forces acting on the airplane, such as the vertical force on the wheels in contact with the deck forward of the center of gravity and the downward aerodynamic force on the elevator which held the plane in the three-point landing attitude.

The legend appearing in defendant's exhibit 12, "Line of pull at least 3″ and not more than 10″ above center of gravity," had reference not to the direction of the retarding force but to the location of cables inside the fuselage transmitting the strain from the hook attachment to stronger parts of the fuselage.

17. The claims of the patent in suit here relied on are as follows:

> 1. Aircraft landing mechanism, comprising a catch on the craft adapted to engage a stationary retarder, said catch being connected to the craft in such manner that the retarding force applied thereto is transmitted to the craft in the rear of its center of gravity and approximately in fore-and-aft alinement with the center of gravity, whereby the craft may be retarded in landing without substantial tendency to overturn.
>
> 2. Aircraft landing mechanism, comprising a catch on the craft adapted, in its operative position, to engage a stationary retarder, said catch being so disposed in the rear of the center of gravity of the craft as not to project beyond the lateral outline of the fuselage of the craft, and means adapted to be projected beyond the vertical outline of the body of the craft to guide the said retarder and catch into engagement.
>
> 3. Aircraft landing mechanism, comprising a catch on the craft, which when in its operative position will engage a retarder, said catch being so disposed in the rear of the center of gravity of the craft as not to project beyond the lateral outline of the fuselage of the craft, and a rod extending obliquely from the craft beyond its vertical outline, to guide the retarder and catch into engagement.

4. Aircraft landing mechanism, comprising a member adjustably supported on the plane, a hooked member carried by said adjustable member for engaging landing mechanism and attached to the plane at a point in the rear of its center of gravity, and means within the control of the pilot for moving said adjustable member to desired positions.

5. Airplane landing mechanism, comprising a hook to engage the landing device, a member attached to the plane and adapted to guide said hook and landing device into engagement and a support for the hook near the end of said guiding member.

7. Airplane landing mechanism comprising a landing device at a fixed location, a member pivoted to the plane, an engaging hook supported near the end of such member, which latter is adapted to guide the said landing device and hook into engagement, and means within the control of the pilot for adjusting said guiding member to desired positions in relation to the body of the plane.

8. Airplane landing mechanism, comprising a guiding member pivoted to the airplane and adapted to be moved to an inclined position extending beyond the limits of planes bounding the vertical area of the fuselage of the airplane, a device attached to the plane and provided with a hook to engage landing mechanism and means within the control of the pilot for adjusting the guiding member to desired positions to adapt it to cause the landing mechanism to engage said hook.

9. Airplane landing mechanism, comprising a landing device, a guiding member therefor pivoted to the body of the airplane and normally maintained in a position within the area between planes bounding the vertical limits of the aircraft fuselage, means attached to the airplane in the rear of its center of gravity to engage the landing device, means to release said guiding member from its normal position and cause it to assume an inclined position in relation to the airplane and adapt it to engage the landing device secured in a predetermined location.

11. Airplane landing mechanism consisting of an arm pivoted to the plane, a hook supported at the free end thereof which is adapted to engage a retarding device upon the landing surface and means connecting the plane and said arm which is adapted to cause the arm always to assume a position longitudinally in line with the direction of the retarding force applied.

12. Airplane landing mechanism, comprising a member pivoted to the airplane for guiding the landing de-

vice, a hook attached to said member at its free end to engage the landing device, a universal joint between the hook and the airplane and means within the control of the pilot to cause said member to assume desired positions outside of the area between planes which bound the vertical limits of the airplane structure.

13. Aircraft landing mechanism, comprising a landing device at a prescribed location, an adjustable member attached to and projecting from the aircraft, an engaging hook normally supported by said member, which latter is adapted to guide the landing device and hook into engagement, and universal connection between the hook and aircraft.

14. Airplane landing mechanism, comprising a stationary retarder on the landing surface, an arm attached to the airplane, a universal joint between the plane and the arm to permit the ready adjustment of the latter to the direction of the pull of any retarding force and a hook at the free end of said arm which is adapted to engage said retarder.

15. The method of landing airplanes which consists in applying to such plane from a fixed retarding device at the landing surface while the plane is still in flight, a force which acts in the rear of its center of gravity and tends to maintain the plane in an upright position when it strikes the landing surface.

16. The method of landing aircraft upon restricted landing surfaces, which consists in guiding the plane above such surface in proximity thereto and parallel therewith, and while still in flight applying a retarding force to the craft in the rear of its center of gravity by means located upon the landing surface, and continuing the application of such force until the plane comes to rest.

18. On July 14, 1922, there were available the following patents and publications:

United States patent to C. A. Smith, no. 565805, issued August 11, 1896 (deft's ex. 40);

United States patent to G. H. Curtiss, no. 1223315, filed Nov. 22, 1913, issued April 17, 1917 (deft's ex. 54);

United States patent to H. C. Mustin, no. 1160525, filed Feb. 18, 1915, issued Nov. 16, 1915 (deft's ex. 42);

United States patent to H. Kleckler, no. 1290236, filed April 16, 1917, granted Jan. 7, 1919 (deft's ex. 43);

United States patent to G. H. Curtiss, no. 1368548, filed Jan. 21, 1915, issued February 15, 1921 (deft's ex. 63);

United States patent to L. J. Le Mesurier, no. 1315320, filed June 10, 1919, issued Sept. 9, 1919 (deft's ex. 44);

United States patent to G. B. Vroom, no. 1488572, granted April 1, 1924, on an application, Serial no. 523943, filed Dec. 21, 1921 (deft's ex. 46, 46a);

United States patent to J. H. Cruickshank, no. 1451493, filed Nov. 26, 1921, issued April 10, 1923 (deft's ex. 45);

German patent to H. Strieffler, no. 227242, filed Sept. 8, 1908, published Oct. 17, 1910 (deft's ex. 50 and translation 50–a);

German patent to H. Strieffler, no. 227243, filed Nov. 27, 1908, published Oct. 17, 1910 (deft's ex. 51 and translation 51–a);

German patent to H. Strieffler, no. 227244, filed May 25, 1909, published Oct. 17, 1910 (deft's ex. 52 and translation 52–a);

French patent to LaCoste, no. 425639, filed January 15, 1911, published June 15, 1911 (deft's ex. 53 and translation 53–a);

French patent to A. von Keissler, no. 446667, filed July 30, 1912, granted Oct. 7, 1912, published Dec. 12, 1912 (deft's ex. 72 and translation 72–a);

British patent to A. von Keissler, no. 18171 of 1912, filed Aug. 7, 1912 (deft's ex. 48);

British patent to A. von Keissler, no. 18178 of 1912, filed August 7, 1912 (deft's ex. 49);

Austrian patent to A. von Keissler, no. 62635, filed July 20, 1912, published Dec. 27, 1912 (deft's ex. 47 and translation 47–a);

British patent to Armstrong Whitworth & Company, Ltd. (British patent to Le Mesurier), no. 131398, filed June 24, 1918 (defendant's exhibit D–85);

British patent to Whiteway, no. 132092, filed October 4, 1918 (defendant's exhibit D–81);

San Francisco Call of January 19, 1911 (deft's ex. 24);

San Francisco Chronicle of January 19, 1911 (deft's ex. 24);

San Francisco Examiner of January 19, 1911 (deft's ex. 24);

United States Naval Institute Proceedings, vol. 37, no. 1, March 1911, pages 163–207 (deft's ex. 38);

Aeronautics, issue of March 1911, pages 95–97, inclusive (deft's ex. 39);

Aeronautical Engineering—Supplement to The Aeroplane, issues of Nov. 5, 1919 (pp. 1589–1594, inclusive); Nov. 12, 1919 (pp. 1661–1666, inclusive); Nov. 19, 1919 (pp. 1743–1746, inclusive); Dec. 10, 1919 (pp. 1911–1912, inclusive); Dec. 17, 1919 (pp. 2013, 2014, 2016), available to the public in the Library of the Smithsonian Institution, Washington, D. C., subsequent to January 2, 1920 (deft's exs. 69 and 79);

All the World's Aircraft—1920 (pages 21a to 36a, inclusive), available to the public in the Library of Congress, Washington, D. C., since January 20, 1921 (deft's exs. 67 and 78).

Each of the above patents and publications is made a part hereof by reference.

19. German patents to Strieffler, Nos. 227242, 227243, and 227244, defendant's exhibits 50, 50–A, 51, 51–A, 52, and 52–A, disclose an arresting gear for aircraft, in which a cable is stretched between pylons, intended to be used with lighter-than-air and heavier-than-air craft. So far as there is any disclosure of the apparatus installed on a heavier-than-air machine, it contemplates a post extending vertically through the airplane and terminating in a hook projecting above it. The plane, after engaging the cable and being arrested, remains off ground, dangling on the cable. German patents Nos. 227243 and 227244 to Strieffler relate particularly to improvements by which the shock of engagement between the aircraft and the cable is reduced.

There is no evidence that the devices of these patents were ever constructed or used, and there is no disclosure of landing and stopping an airplane by applying to the plane while in flight a retarding force at a point in the rear of the center of gravity and in approximately fore-and-aft alinement therewith.

20. French patent No. 425639 to La Coste, defendant's

exhibits 53 and 53-A, discloses apparatus of the same general character, in which an arresting cable is supported between two towers, the cable passing over pulleys in the towers and downwardly onto drums provided with spiral springs. When the airplane engages the cable it pulls the cable out, unwinding the cable off the drums and winding up the drum springs, applying a retarding force to the aircraft.

21. Von Keissler British patents Nos. 18171 and 18178, defendant's exhibits 48 and 49, respectively, Austrian patent No. 62635, defendant's exhibits 47 and 47-A, and French patent No. 446667, defendant's exhibits 72 and 72-A, disclose various types of drag brakes, such as rakes or plows, vertically movable under the pilot's control, located under the tail of the airplane. They are adapted to be driven into the ground to anchor the plane while at rest and also to catch in the ground to check the roll of the plane after landing. They are not intended for engaging a stationary retarding mechanism while the plane is in flight and do not operate to land the plane, but only to check its roll after landing.

Claim 4 of the patent in suit in terminology does not recite structure different from that of the von Keissler patents, and these patents are anticipatory of claim 4.

22. U. S. patent to Curtiss, No. 1368548, defendant's exhibit 63, discloses a ground brake not substantially different from that of the von Keissler patents discussed in finding 21.

23. U. S. patent No. 1160525 to H. C. Mustin, defendant's exhibit 42, discloses an arresting apparatus for seaplanes consisting of a "drogue," a kind of water brake or drag attached to the tail of a seaplane by means of a cable. In making a landing, the pilot releases the drogue, which dives into the water and pulls down the tail of the plane, thus assuring that the seaplane will strike the water in a nose-up attitude, and preventing it from burying the nose of the pontoons in the water and tending to overturn.

24. In 1911 Eugene B. Ely made a landing on the U. S. S. *Pennsylvania* in San Francisco Harbor. This landing was in the nature of a "stunt" and received much newspaper publicity. For this landing a special deck was built on the

Pennsylvania and a large number of ropes were stretched transversely at intervals across the deck with sandbags at each end. The ropes were held a few inches off the deck by means of beams laid longitudinally, and pivotally mounted hooks were provided on the landing gear of the airplane, resiliently held in position by springs. As the airplane came in to land, it alighted upon the deck, and, as it rolled forward, the hooks on the landing gear picked up the ropes progressively and dragged the sandbags along and the drag of the sandbags arrested the roll of the plane. The hooks were disposed below the center of gravity and in the rear thereof. The airplane employed was the now obsolete type of Curtiss pusher machine, a slow and light machine with a three-wheeled landing gear, one wheel being carried upon an outrigger in front of the machine. With this type of landing gear a considerably greater upsetting force could be employed without nosing the machine over than with the later types, in which the forward wheel was done away with.

Claim 11 fails to distinguish structurally from the hook mechanism used by Ely in his landing on the *Pennsylvania* and is anticipated thereby.

25. Some time prior to March 18, 1920, experiments with airplane arresting gear were carried on at the Isle of Grain, England. Some of this experimental work was described in printed publications as follows:

Jane's All the World's Aircraft—1919, defendant's exhibit 71; Jane's All the World's Aircraft—1920, defendant's exhibit 67; Aeronautical Engineering—Supplement to The Aeroplane, issues of November 5, 1919, to December 17, 1919, defendant's exhibit 69.

In some of the mechanisms experimented with, as described in these publications, the airplane was equipped with a hook hinged or attached by a bridle below or on the bottom of the airplane fuselage and somewhere near in vertical alinement with the center of gravity.

The apparatus described by these publications was experimental and none of it provided a satisfactory solution of the problem.

26. Personal knowledge of certain of the Isle of Grain experimental apparatus was introduced into this country

by a report of Lieutenant Hague, an American Naval officer who witnessed some of the experiments and filed a report, which was rewritten by other Navy personnel in London and forwarded to the Navy Department in Washington, D. C. This report was not a printed publication but was confidential Navy Department correspondence.

27. The patents to Strieffler (see finding 19), LaCoste (see finding 20), Von Keissler (see finding 21), Curtiss (see finding 22), Mustin (see finding 23), and the publications concerning the Isle of Grain experiments (see finding 25) do not disclose the idea of arresting an airplane while in flight by applying a retarding force in the rear of the center of gravity and approximately in horizontal alinement therewith.

In the Ely demonstration the plane was not arrested while in flight and the retarding force was not applied behind the center of gravity and in horizontal alinement with it.

28. U. S. Patent to Cruickshank, No. 1451493, patented April 10, 1923, on an application filed November 26, 1921, discloses airplane arresting gear in which the airplane is provided with a trailing hook for engaging a stationary arresting cable. It contains no disclosure that the retarding force is applied to the airplane at a point in the rear of the center of gravity and in fore-and-aft alinement therewith. The filing date of application of the Cruickshank patent is subsequent to plaintiff's date of conception, May 18, 1920, subsequent to the date of the successful demonstration of plaintiff's apparatus to the Navy authorities in October 1921, and subsequent to the filing date, May 18, 1920, of his forfeited application, but prior to the filing date, July 14, 1922, of his renewal application.

29. U. S. patent to Vroom, No. 1488572, patented April 1, 1924, on an application filed December 21, 1921, discloses apparatus for arresting an airplane, the airplane being provided with a trailing hook for engaging an arresting cable, the hook being "so attached that the pull will come at or near the center of gravity of the plane." Like the patent to Cruickshank, the date of application of the Vroom patent is subsequent to plaintiff's date of conception, subsequent to his successful demonstration to the Navy authorities, and

subsequent to the filing date, May 18, 1920, of his forfeited application, but prior to the filing date, July 14, 1922, of his renewal application.

30. In British patent No. 131398 to Le Mesurier the airplane is provided with a pole pivoted at its forward end on the under side of the fuselage and ending in a hook. The pole can be raised and lowered, and when lowered it extends obliquely backward and downward from its point of attachment. In the provisional specification, page 3, line 36, the hook is described as attached "to the aeroplane at a point which is as near as possible to the centre of gravity of the machine so that the latter will have no tendency to tip when being arrested;" while in the complete specification, page 7, line 54, it is described as attached "at a point which is as near as possible to the centre of gravity of the machine so as to minimise the tendency of the machine to tip when being arrested."

Figure 2 of the patent, reproduced below, is stated to be a "somewhat diagrammatic side elevation showing the manner in which the loops are engaged by an aeroplane when alighting." With the hook in the position shown in the figure, there would be some tendency for the plane to nose over and strike the deck.

The landing area mechanism disclosed in the patent consists of a series of cables held above the deck a distance slightly less than the radius of the landing wheels of the plane and equipped with loops extending transversely across the deck. The patentee, page 2, lines 35–36, describes the operation of the apparatus as follows:

> Thus when an aeroplane is about to alight as it comes down on the landing surface it will pass in succession over these loops and a hook suitably disposed on the under part of the aeroplane will engage with certainty one or other of the loops.

It would be possible for the hook to engage a loop before the landing wheels had touched the deck.

31. United States patent No. 1315320 to Le Mesurier has reference to the same arresting gear as that disclosed in British patent No. 131398. The patent contains the same drawings and the written descriptions and disclosures are

substantially identical in the two patents. However, the United States patent in the description of the operation of the apparatus contains the words appearing in italics which are not in the British patent:

> Thus when an aeroplane E is about to alight as it comes down on the landing surface A it will pass *as shown in Fig. 2* in succession over these loops and a hook F suitably disposed on the under part of the aeroplane will engage with certainty one or other of the loops.

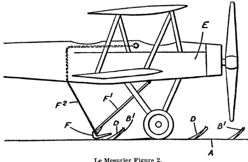
The text of the specification does not disclose applying the retarding force at a point in the rear of the center of gravity and substantially in fore-and-aft alinement therewith but at the center of gravity itself. If the application of the retarding force were made at the center of gravity itself there would be no tendency of the plane to overturn as a result of the action of the retarding force, but, on the other hand, the retarding force would not then act to oppose any tendency to overturn or yaw if such tendency came about through other causes, as the apparatus disclosed in the patent in suit acts.

The broad terminology of claim 5 of the patent in suit is sufficiently comprehensive to fairly define the defendant's structure in which the hook is not detachable from the pole, and such terminology also fairly describes the Le Mesurier structure, and the Le Mesurier structure is anticipatory thereof.

Claims 7 and 8 of the Pratt patent in terminology fail to distinguish over the structure of Le Mesurier in that they fail to point out that the retarding force is applied behind the center of gravity and in fore-and-aft alinement therewith. The Le Mesurier structure is anticipatory with respect to these claims.

Insofar as the hook might engage the landing area mechanism before the landing wheels contacted the deck, the Le Mesurier structure anticipates claims 15 and 16. These patents anticipate claims 12, 13, and 14 of the patent in suit, except as to the use of a universal joint or connection, as to which, see finding 34.

There is no evidence that any plane was ever built or operated according to Figure 2 of the Le Mesurier patents.



Le Mesurier Figure 2.

32. The British patent to Whiteway (defendant's exhibit D–81) illustrates and describes arresting gear for the landing of aircraft where the available run on landing is restricted.

The portion of the equipment on the landing area comprises a series of parallel cables arranged in tension at a suitable height above the landing area, these cables running fore and aft or parallel to the path of travel of the airplane instead of transverse thereof as disclosed by the Pratt patent in suit. Intermediate their ends and as shown in Figure 1 of the drawings, over one-third down the length of the landing area or runway, the cables are provided with forked or Y branches, the adjacent branches being passed through movable retarding rings located about two-thirds of the way down the landing area. These rings are so designed as to rather closely encircle the two adjacent cables so that as the rings are pushed along these cables, friction will result and an arresting force will thereby be set up.

The equipment located on the plane consists of a plurality of snap rings or clips carried on the main axle and project-

ing downwardly therefrom, the function of these clips being to encircle or trap the longitudinal cables when the plane is landed, and as the plane then subsequently rolls forward on the landing surface the Y or spread portion of the cables engages the clips and causes a retarding or braking effect. When the plane rolls still farther the clips will come in contact with the rings and push them along the cables, the resulting friction of the rings exerting the maximum retarding force to bring the plane to rest. The specification describes this landing operation as follows:

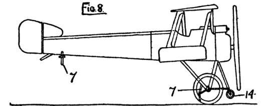
> In operation on the aircraft alighting on the surface 1 and running along the same the wires immediately engage in the clips and on the clips reaching the forked branches increased resistance is offered by these branches and by the rings 6 being forced along two adjacent branches, thus materially assisting in bringing the aircraft to rest.

The specification also states:

> If desired, the tail of the aircraft may be provided with clips 7 of a similar nature to those hereinbefore described, and carried by a support arranged in such a way as to allow the clips to be raised or lowered by the aviator as required.

The specification also indicates that this support near the tail of the aircraft may be hinged to the tail to allow the clips to be raised and lowered. This construction is diagrammatically shown in Figure 8, which is reproduced herewith, no further details or constructional features being given.

This figure shows the tail clips located above the three-point line of the wheels and tail skid and projecting vertically downward from the airplane. However, the statements in the specification that the support might be hinged and so arranged as to allow the clips to be raised or lowered as desired prevent the drawing in Figure 8 from limiting the location and length of the tail clip to that shown in Figure 8. The clip could, under these disclosures, be dropped below the line of the wheels and tail skid if desired, as, for example, to more readily retard a plane while it was still in the air.



The Whiteway patent discloses a catch on an airplane adapted to engage a stationary retarder, the catch being connected to the airplane in such a manner that the retarding force may be applied to the airplane while still in flight, and in the rear of and approximately in fore and aft alinement with the center of gravity.

The catch in the Whiteway patent, even as located as shown in Figure 8, could engage the retarding cable while the plane was still in flight if the plane passed over the cable in a tail down attitude or if the plane descended across the cable in such a direction that the front part of the landing gear passed over the cable and the catch engaged before the wheels touched the deck. Claims 1, 15, and 16 of the Pratt patent in suit are readable upon the disclosure of this patent.

33. The disclosures of claims 2, 3, and 9 are a combination of Le Mesurier's arm and hook with Whiteway's point of attachment and do not amount to invention.

34. Claims 12, 13, and 14 of the Pratt patent in suit add to the devices previously discussed the use of a universal connection between the plane and the rod. Whiteway taught that his catch near the tail of the plane might be hinged so as to permit it to be raised or lowered. Le Mesurier employed a hook attached to an arm which was pivoted beneath the fuselage. The hooks used on Ely's plane were described as "pivotally mounted," which disclosed a universal connection. Hence the use of a universal connection in place of the hinged or pivotal mountings previously used is not invention, and claims 12, 13, and 14 are not made valid by the inclusion of this device.

35. The claims of the Pratt patent in suit are invalid.

36. The mechanism employed by the defendant during the period here involved did not infringe plaintiff's patent if the patent was valid.

The court decided that the plaintiff was not entitled to recover.

MADDEN, *Judge*, delivered the opinion of the Court:

This is a patent case in which plaintiff charges the defendant with the infringement of all the claims, except claims 6 and 10, of United States Patent No. 1499472, issued to plaintiff, Hazen C. Pratt, July 1, 1924, for "Airplane Landing Mechanism." On February 8, 1937, this court rendered its decision sustaining claims 1, 2, 3, 9, 12, 13, 14, 15, and 16 as valid and infringed. *Hazen C. Pratt* v. *The United States*, 85 C. Cls. 1. The case is now before the court under the order of December 4, 1939, granting the defendant's motion for a new trial under Section 175 of the Judicial Code.[1] The order authorized the defendant to present evidence regarding the patents, publications, and uses listed in its motion and their effect on the claims previously held valid and infringed, and to present additional evidence as to the method or methods of landing and apparatus employed by the United States within a period of six years prior to the filing of the petition. The prior record was made available on the new trial.

Pursuant to the order, the defendant on the new trial introduced the newly discovered prior patent to Whiteway (see finding 32) and prior British patent to Le Mesurier (see finding 30) and presented testimony of Captain Richardson, former head of the Design Branch of the Bureau of Aeronautics of the Navy Department, as to the apparatus and technique employed by the defendant during the period in question.

[1] The Court of Claims, at any time while any claim is pending before it, or on appeal from it, or within two years next after the final disposition of such claim, may, on motion, on behalf of the United States, grant a new trial and stay the payment of any judgment therein, upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong, or injustice in the premises has been done to the United States; but until an order is made staying the payment of a judgment, the same shall be payable and paid as on March 3, 1911, was provided by law.

The various claims in plaintiff's patent involve an airplane landing mechanism, consisting of a rod attached to the body of the plane by a universal joint at a point in the rear of and below the center of gravity of the plane, with a hook on the end of the rod for the purpose of engaging a retarding device such as a cable stretched on the deck of the ship or other limited area where the plane is to be landed. The rod, withdrawn to lie against the body of the plane while in flight, serves when its hook end is let down by the pilot, to strike on the cable when the plane passes over the cable, and by sliding across the cable to bring the hook into engagement with it. When the cable is caught by the hook, it is stretched, whereupon braking devices such as drums or springs or pneumatic pistons at the ends of the cable bring the plane to a gradual stop. Instead of the hook being on the end of the rod, the hook might, under the claims, be attached to the end of, for example, a wire or cable connected with the plane, with a rod serving only the purpose of guiding the hook into engagement with the cable on the ground or deck. Under that arrangement, the pull would not be upon the rod, but upon the wire or cable attached to the plane. No patent is claimed upon the mechanism on the ground or deck, intended to be engaged by the mechanism on the plane.

Plaintiff stressed in his claims the merit of arresting the speed of the plane while in flight, and thus letting it descend to the landing surface after its forward motion had been decelerated. In order to carry out this purpose without danger that the plane would nose over forward or yaw sidewise as a result of the pull, plaintiff specified that the pull of the hook and rod should be exerted upon the plane to the rear of the center of gravity of the plane and approximately in fore and aft horizontal alinement with the center of gravity of the plane.

The defendant claims that the mechanism covered by plaintiff's claims was anticipated by earlier patents, publications, and practices, and that in any event the defendant did not, within the period of the statute of limitations before the bringing of this suit, infringe plaintiff's alleged patent.

As to anticipation, the device of the rod attached to the plane by a hinge or pivot, with a hook at the end of the rod to engage a retarding device on the landing surface was shown by Le Mesurier's United States Patent, issued September 9, 1919. (See findings 30 and 31.) Figure 2 of Le Mesurier's patent is reproduced in finding 31. British, Austrian, and French patents to Von Keissler in 1912 (see finding 21) had disclosed various types of drag brakes such as rakes or plows, vertically movable under the pilot's control and intended to be let down to tear into the earth and stop the progress of the plane after its landing gear had touched the ground. These devices did not contemplate engagement with any retarding mechanism located on the landing field.

Plaintiff claims originality in the attachment of the rod or cable to the body of the plane at a point which would permit the retarding force to be transmitted to the plane in the rear of and in approximate fore and aft horizontal alinement with the center of gravity of the plane. However, the British patent to Whiteway of 1918, referred to in finding 32, Figure 8 of which patent is reproduced in that finding, shows a catch on a plane adapted to engage a stationary retarder, the catch being so located that the retarding force may be applied to the plane in the rear of and approximately in fore and aft horizontal alinement with the center of gravity of the plane.

If, then, the rod and hook were anticipated, and their location on the plane was anticipated, was their being so designed as to operate to retard the movement of the plane while still in flight, and thus cause it to land, rather than merely to retard the movement of the plane and stop its roll on the landing surface after it had reached that surface, original? We think not. The catch on the Whiteway patent as pictured in Figure 8 would operate that way if the plane were flown across the landing cable in a tail down attitude, or, whether or not the plane was in that attitude, if it descended across the cable in such a position that the front part of the landing gear passed over the cable but the catch engaged it. And the likelihood of such an engagement would be increased by lengthening the catch, or the member connecting it with the body of the plane, or by putting the catch at the end of a

hinged and movable rod, as Whiteway suggested and as Le Mesurier did. Whiteway's patent may not be limited to the exact construction and proportionate dimensions shown on his drawing when his specifications provided in terms for hinging the support, or arm of the catch, and arranging it "in such a way as to allow the clips to be raised or lowered by the aviator as desired."

The Le Mesurier United States patent device could also operate to retard a plane while in flight. Whether it was intended to do so or not is not clear. A portion of the specifications is as follows:

> Thus when an aeroplane *E* is about to alight as it comes down on the landing surface *A* it will pass as shown in Fig. 2 in succession over these loops and a hook *F* suitably disposed on the under part of the aeroplane will engage with certainty one or other of the loops.

Figure 2 of the Le Mesurier patent, reproduced in connection with finding 31, cannot be taken as limiting the possible descent of the hook to a point just above the horizontal plane passing through the bottom of the wheels, even taking into consideration the statement in the spcifications "as shown in Fig. 2." (See finding 31.) In the British patent to Le Mesurier of 1918, referred to in finding 30, there is the same Figure 2 and the same written matter as in his American patent, except that the language "as shown in Fig. 2," quoted above, is not present. As to the British patent then, there would be no reason at all for limiting the scope of the patent to the exact design shown by the drawing. And when one looks at Figure 2 in both patents it is easy to see why the hook was located as it was in the drawing. The wheels are on the deck, and the hook could not be put lower except by showing it protruding through the deck.

Even if the Le Mesurier patents were limited to the exact design shown in Figure 2, it would be possible for a plane, if it came in in a tail-down attitude, to just miss with its wheels but engage with its landing hook a transverse cable before the wheels touched the deck.

Even if Whiteway's patent with its catch (hook) and hinged support (rod) located as it was did not anticipate all the essentials of plaintiff's patent, as we believe it did, it is

plain that by using Le Mesurier's rod and hook and attaching the rod where Whiteway's catch is attached to the plane, one has plaintiff's device. We see no invention in the combination of these two elements, even if we assume the originality of either or both of them in the minds of Le Mesurier and Whiteway. This is not a case where the combination of two or more anticipated devices produced a successful or greatly improved mechanism which displaced prior mechanisms in the trade and thus proved its originality. Compare *Eibel Co.* v. *Paper Co.*, 261 U. S. 45; *The Barbed Wire Patent*, 143 U. S. 275. Here the proof shows that the supposed merit of plaintiff's invention, i. e., the slowing down of a plane while it is still in the air, in order to land it, has not been well regarded by the defendant and plaintiff has not shown that it had been adopted by others. The proof shows rather, as is brought out in our discussion of infringement, that so far as the defendant is concerned, the hook does not, if the landing is skillfully accomplished, engage the cable until after the plane has touched the deck, and if it does so engage it while the plane is a few inches off the deck just before touching it, the cable exerts no retarding force until after the wheels of the plane are rolling on the deck.

The universal joint as a device for attaching the rod to the fuselage was not invention. The device itself was well known and Ely had in 1911 (finding 24) and Le Mesurier, in 1918, (finding 30) attached their hooks by "pivots" or universal connections. Plaintiff has not pointed us to any substantial distinction between the pivot connection of his claims 7, 8, 9, 11, and 12, and the universal connection of claim 13, and universal joint of claims 12 and 14. In claim 12, pivot and universal joint seem to be used by plaintiff as synonymous.

We now consider the question whether, assuming patentability, the defendant has infringed. The patent which we must assume is one for an airplane landing mechanism consisting of a movable rod with a hook attached either permanently to the rod, or to a cable, which hook may be so disposed by the pilot that it will engage a retarding device installed on the deck or other limited landing area while the plane is still in flight, and by exerting a pull upon the plane

in a direction approximately horizontal and in fore and aft alinement with the center of gravity of the plane, retard it and cause it to land.

The mechanism used by the defendant during the period in question consisted of a rod and hook attached in the rear of and below the center of gravity of the plane, the rod extending rearward and, when pulling, being inclined downward at an angle of 24 degrees from the horizontal, intended to engage transverse cables stretched at right angles to the course of the plane, some fourteen inches (the approximate radius of the wheels of the plane) above the deck, each cable being so attached at its ends that no retarding force is applied until the hook draws the cable into the shape of a V with the point several feet in front of the line which was the position of the cable before it was hooked.

The purpose of the mechanism was not to retard planes while in flight and thus cause them to descend to the landing deck, but to retard their forward progress after they had touched the deck. The construction of the mechanism was such as to reduce to a minimum the possibility of the plane being caught and retarded in flight, which was regarded by the defendant as dangerous. The cables were placed so low that in every case if the plane had not already touched the deck when the hook engaged, it would descend only a few inches farther before doing so, and the tension of the cables was such that no retarding force would be applied to the plane until after its wheels were rolling on the deck.

When plaintiff in 1921 made his demonstration to the defendant's officers, Commander (then Lieutenant) Stone disapproved plaintiff's idea of hooking a plane while in flight, saying it was dangerous. The proof shows that the defendant's officers never changed their views in this regard.

It may be urged that even if the defendant did not desire to retard its planes while still in flight, and did not use its mechanism to do so except by inadvertence or unskillfulness, yet the mechanism was an infringement because it was capable of so operating, and did, on occasion, so operate. We do not think that the monopoly of a patent covers another device, constructed in good faith to operate upon a principle

different from that involved in and intended by the patent, merely because it is impossible or impracticable to construct the other device so that it can be operated without inadvertently or unskillfully, upon occasion, infringing upon the outside boundaries of what might seem literally to be within the patent. The purpose and the real or supposed advantages of the patent have a bearing upon the scope of the monopoly. If the accused infringer does not recognize as an advantage the idea of the patent, avoids the use of the idea to the greatest extent possible, and does not in fact gain any advantage from his occasional straying across the supposed boundary, he is not, in fact, an infringer because the proper boundary of the patent does not extend so far.

In the instant case, it would not be a proper application of the purpose of the patent laws to construe plaintiff's assumed patent for a device to retard the speed of a plane while still in flight so broadly as to prevent the development and use by others of a device to stop the roll of a plane after it has touched the landing surface. The two ideas are different. Indeed, plaintiff's asserted novelty lay only in the accomplishment of the former, since the latter was plainly anticipated. But because the whole problem arises out of the necessity for landing planes on a surface of limited area, and because the accomplishment of the feat is at best a hazardous one involving great skill, the defendant, desiring to retard the speed of the plane after it has touched the surface, should not be compelled, in order to avoid infringement, to waste a considerable amount of the limited landing area by locating its transverse cables so far forward on the deck that its planes will never engage one of the cables until after they have touched the landing surface.

We conclude that all of plaintiff's claims are invalid as having been anticipated, and that his claim to a device attached in the rear of and so disposed as to exert a retarding force in approximate fore and aft horizontal alinement with the center of gravity of the plane, in order to retard the speed of the plane while still in flight, was not infringed by the defendant.

The findings of fact, conclusion of law, and opinion heretofore filed are vacated and withdrawn, and new findings of

fact, conclusion of law dismissing the petition, and this opinion are now filed. It is so ordered.

JONES, *Judge;* and WHALEY, *Chief Justice*, concur.

LITTLETON, *Judge*, concurs in the findings, and the opinion as to claim 1 of the patent, and dissents as to claims 2, 3, 9, and 12 to 16 inclusive.

WHITAKER, *Judge*, took no part in the decision of this case.

THE NORTHWESTERN BANDS OF SHOSHONE INDIANS v. THE UNITED STATES

[No. M-107. Decided March 2, 1942]

On the Proofs

Indian claims; exclusive use and occupancy; treaty of July 30, 1863.—Where, in the treaty of July 30, 1863, between the Northwestern Bands of the Shoshone Nation or Tribe of Indians and the United States, the defendant did not set aside any specific area for the exclusive use and occupancy by plaintiff bands; and where by said treaty the defendant did not recognize or acknowledge any exclusive use and occupancy right and title of said Indians to the whole or any portion of the acreage claimed in the instant case; it is *held* that plaintiffs are not entitled to recover as for a taking by the United States.

Same; limitation in the Jurisdictional Act.—Although the plaintiff bands, insofar as other tribes were concerned, may have exclusively occupied and used all or a portion of the territory involved in the instant claim as their aboriginal home (and the record is held to be sufficient to show they did); it is *held* that plaintiff bands are not entitled to recover, for the reason that the Jurisdictional Act under which the instant case is brought authorizes the court to consider, adjudicate and render judgment only on a claim "arising under and growing out of the treaty with said plaintiff bands."

Same.—Such a claim must be one that is within the terms of and supported by the provisions of the treaty; and aboriginal occupancy and use is not such a claim.

Same; treaties of 1863; peace and amity.—The treaties made with the Shoshone Indians in 1863 were treaties of peace and amity, and it was not the intention of the Government to recognize, by said treaties, any exclusive use and occupancy

title of the Indians to the lands which said Indians then occupied.

Same; Mexican cession; status of Indian lands.—The question whether under the Mexican laws at the time of the Mexican cession of 1848 plaintiff bands had use and occupancy rights—that is, "Indian title"—to certain of the lands involved in the instant case based upon aboriginal possession or occupancy, to the exclusion of other Indian tribes, has been decided adversely to such contention in the decision of the Supreme Court in *United States, as Guardian*, v. *Santa Fe Pacific Railroad Co.*, 314 U. S. 339.

Same; deficiency in expenditures of appropriated amounts.—Where, following the ratification of the treaty of July 30, 1863, there was appropriated by Congress for the Northwestern Bands of Shoshone Indians the sum of $5,000 annually for 20 years, as stipulated in said treaty; and where it appears from the record that the total of the amount so appropriated, except $10,804.17, was expended and disbursed by the Government in goods and provisions for said Northwestern Bands; an interlocutory order, under Rule 39a of the court, was entered reserving for further proceedings the determination of the amount of recovery, if any, in respect to said amount of $10,804.17 after determination of the amount of offsets, if any.

Same; interest as part of just compensation.—Plaintiff bands are not entitled to recover interest on such deficiency, if any, in the treaty annuities, for the reason that the record does not establish that this money was taken by the United States under such circumstances as would entitle the plaintiff bands to interest as a part of just compensation. *The Choctaw Nation* v. *United States*, 91 C. Cls. 320 cited.

The Reporter's statement of the case:

Mr. Ernest L. Wilkinson and *Mr. Herman J. Galloway* for the plaintiffs. *Mr. Joseph Chez*, *Mr. Charles J. Kappler*, *Mr. Frank K. Nebeker*, and *Mr. Clinton D. Vernon* were on the brief.

Mr. George T. Stormont, with whom was *Mr. Assistant Attorney General Norman M. Littell*, for the defendant. *Mr. Raymond T. Nagle* was on the brief.

In the petition plaintiff bands of the Shoshone tribe seek to recover $15,000,000 for the alleged unlawful taking of their lands, aggregating 15,643,000 acres, in alleged violation of a treaty of July 30, 1863, and $70,000 of the treaty annuities of $5,000 per annum for twenty years which it is

alleged the Government failed to furnish in goods and provisions as agreed.

Defendant contends that the treaty of July 30, 1863, with plaintiff bands was a treaty of peace and amity and that it did not recognize, acknowledge, or concede as against the sovereign an exclusive use and occupancy right or title of the Indians; that the United States did not at that time recognize or has it ever recognized an exclusive right of occupancy in plaintiff bands to the whole or any part of the territory now claimed by them, but that it has ever exercised dominion and complete ownership over it.

Defendant further contends with reference to the annuity provisions of the treaty that if there was any deficiency in the furnishing of the annuity goods provided therein, such deficiency did not exceed $10,804.17.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff bands of Shoshone Indians were in 1863 and prior thereto a part of about fourteen bands of the Shoshone nation or tribe of Indians located in the territories of Washington and Utah. The area inhabited and occupied by the Shoshone nation or tribe of Indians became a part of the states of Wyoming, Colorado, Utah, Idaho, and Nevada. For convenience the officials and agents of the United States having charge of Indian affairs designated and referred to the plaintiff Indians of the Shoshone tribe as the "Northwestern" bands of the Shoshone Indians in their correspondence, reports, and treaties. The Shoshone nation, or tribe, itself had no such recognized division. The Shoshone tribe of Indians with its affiliated bands of Bannock Indians and a number of individual Indians of other friendly tribes, who had extensively intermarried among the Shoshones and lived with them, roamed over, occupied, and used as their home a vast area approximating 80,825,000 acres. During and prior to 1863 the Shoshone Tribe of Indians and the affiliated bands of Bannocks, from time immemorial, roamed over, lived upon, occupied, and used a territory of the approximate area above mentioned as their home and for their support and livelihood, by hunt-

ing and gathering roots, berries and nuts. This approximate area was exclusively claimed by the Shoshone tribe and Bannock Indians as against other tribes, and their possession, occupancy, and use thereof was asserted by them to the exclusion of other tribes of Indians and was thus recognized generally by other separate Indian tribes. During and prior to 1863 the Indians of the Shoshone tribe and the affiliated bands of Bannocks numbered about 9,700. Washakie was the main or principal chief of the Shoshone nation or tribe and of the affiliated Bannocks, and the Shoshone and Bannock Indians and the chiefs of the various bands of these tribes so recognized him as the principal chief of the tribe. As was the usual custom among Indian tribes, the Shoshone and Bannock Indians had various bands, each having a chief and various subchiefs or headmen.

2. The territory for which compensation is claimed by plaintiff bands of the Shoshone tribe as for a taking by the United States of their use and occupancy title, which interest they claim was recognized and acknowledged by the United States in a treaty of July 30, 1863, consists of 15,643,000 acres of land of which 6,067,000 acres are located in the southeastern part of Idaho, 6,389,000 acres in the northwestern corner of Utah, including Great Salt Lake, and 3,187,000 acres in the northeast corner of Nevada. The population of plaintiff bands in 1863 was between 1,500 and 1,800.

3. In 1850, and prior thereto, practically nothing was known by the Government with reference to the Indians inhabiting the region which became southern Idaho, eastern Oregon, northern Nevada and northern Utah, and little, if anything, was definitely known of the tribal distinctions or racial affiliations, and the Government had no knowledge of the particular or specific areas occupied by particular tribes or bands. The Indians of this region were denominated as Shoshones, Snakes, and Diggers, or Paiutes.

The Indians of the Shoshone and Bannock tribes have always shown an attitude and desire to be peaceful and friendly to the whites and to the Government. Washakie, principal chief of the Shoshone tribe, and the majority of

all the Shoshone Indians of that tribe have been friendly at all times with the white people and with the Government of the United States. The Shoshone tribe, as such, has never at any time engaged in war with the United States. Between 1849 and 1863 some of the Shoshone Indians of the Northwestern Bands caused the emigrants, settlers, and the Government considerable trouble by depredations and warlike acts due to the driving away of game and the destruction of their only source of food supply. Following the advent of the Mormons into Utah, their spread into arable valleys in the southeastern corner of Idaho and the establishment of overland trails to California and Oregon and to the mining regions of Idaho and Montana through the country inhabited by the Shoshone Indians, trouble between some of the Indians and the emigrants and settlers arose. This was due to the driving away by the emigrants and white settlers of the sparse game supply of the Indians and the destruction of the equally sparse supplies of grass and timber from which the Indians also obtained a considerable portion of their livelihood in the form of roots, berries, and nuts, thus causing the Shoshone Indians, especially those located in south central Idaho, northeastern Nevada, and northwestern Utah to be reduced to a condition of practical starvation, rendering it necessary for them to "steal or starve." The Commissioner of Indian Affairs in his annual report for the fiscal year ending June 30, 1859, stated in part as follows:

> The reports of the condition of the Indians in Utah present a melancholy picture. The whites are in possession of most of the little comparatively good country there is, and the game has become so scarce as no longer to afford the Indians an adequate subsistence. They are often reduced to the greatest straits, particularly in the winter, which is severe in that region; and when it is no uncommon thing for them to perish of cold and hunger. Even at other seasons, numbers of them are compelled to sustain life by using for food reptiles, insects, grass seed, and roots. Several farms have been opened for their benefit in different localities, and many of them have manifested a disposition to aid in their cultivation; but, unfortunately, most of the crops were this year destroyed by the grasshopper and other insects. Many

of the numerous depredations upon the emigrants have, doubtless, been committed by them in consequence of their destitute and desperate condition. They have at times been compelled to either steal or starve; but there is reason to be apprehended that in their forays they have often been only the tools of the lawless whites residing in the Territory. In some of the worst outrages of this kind, involving the lives as well as the property of our emigrants, the latter are known to have participated. * * *.

The Superintendent of Indian Affairs for the Utah Territory in his annual report of October 1, 1861, to the Commissioner of Indian Affairs stated:

> Too little attention, I am fearful, has heretofore been paid to the fact that there is very little game in this Territory, of any description, which the Indians can kill to keep them in food. There is no buffalo whatever that range in this Territory, and very few antelope, elk, deer, mountain sheep, or bear, and these only in certain localities.
>
> Civilization seems to have had the same effect here as has been noticed elsewhere in this country since the first settlement by our forefathers, in driving before it the game natural to a wilderness, and the Indians complain bitterly that since the white man has come among them their game has almost entirely disappeared from their former hunting grounds, and they are now obliged either to beg food from the white settlers or starve.
>
> The driving away of the buffalo not only deprives them of their principal supply of food, but also of a great source of revenue and comfort in the skins, which they sold and used to keep them comfortable in cold weather.
>
> I have had more applications from Indians for beef and flour since I have been here than anything else. They frequently come to me and fairly beg for some beef, to keep their squaws and papooses from starving.
>
> Owing to the limited amount of money placed in my hands, I have been unable to entirely satisfy their demands, but I am confident that what I have distributed in that way has been a great deal more satisfactory to the Indians than three times the amount expended in any kind of trinkets usually disbursed by the department would have been.

The annual appropriation for this superintendency has, in my opinion, always been too small to allow the superintendent and agents to give that satisfaction to the Indians which their wants demand, and a proper regard for the rights and safety of the white settlers, by preventing depredations, requires.

* * * * *

The establishment of the overland daily mail and telegraph lines, and their recent completion through this Territory—consummations of such vital importance to the people throughout the Union—renders it necessary that steps should be immediately taken by the government to prevent the possibility of their being interrupted by the Indians.

On this subject I have taken much pains to consult with most of the leading men connected with these great enterprises, and also with nearly all of the head chiefs of the Indians that range on their lines in this Territory, and have, after mature deliberation, come to the conclusion that the only manner in which this can be effected to the entire satisfaction and protection of all the parties concerned, is by a treaty between the United States and the tribes of Indians ranging in this superintendency.

In recent consultations or "talks" with the Wash-a-kee and Sho-kub, the head chiefs of the Shoshones or Snake Indians, Navacoots and Pe-tut-neet, chiefs of the Ute nation, and many of the sub-chiefs of both nations, I find that they are unanimously in favor of a treaty with the United States, and agree with me in considering that to be the only effectual way to check the stealing propensities of some of their Indians; and from information gleaned from them on various occasions, I have made the following memorandum in regard to the probable cost and effect of a treaty.

They express their willingness to cede to the United States all the lands they claim in this Territory, with the exception of reservations necessary for their homes; and ask, in return, that the United States shall make them annual presents of blankets, beads, paint, calico, ammunition, &c., with occasional supplies of beef and flour sufficient to make them comfortable, which I estimate can be done with a small addition to the usual appropriation.

* * * * *

I cannot too strongly recommend this course to the department, and sincerely hope that it will meet with

that prompt attention that, to my mind, the importance of the subject entitles it. * * *

4. In and prior to 1850, and for several years subsequent thereto, the Government was doing practically nothing for these Indians in the way of providing them with food or supplies. The Indian agents and superintendents in the territory inhabited by the Shoshone Indians frequently went among these Indians, especially those inhabiting the routes of western travel, for the purpose of endeavoring to preserve peace and, to that end, gave the Indians along these routes of travel such presents as they were able to provide, which presents were gratefully received by the Indians. All the Indians encountered by these officials as far west as central Nevada and Salmon Falls on the Shoshone River in Idaho professed friendship for the white people and the Government and showed a real desire for peace; they begged of the Government officers provisions and supplies from the Government because of the destruction of their only means of livelihood. As a result of the conditions mentioned, certain Indians of the Northwestern Bands of the Shoshones banded together and made attacks and committed depredations from time to time upon emigrant trains. The conduct of certain unscrupulous white men aggravated and encouraged these attacks and depredations. Because of these conditions and with the desire to prevent or to ameliorate them, the United States' agents and superintendents of Indian affairs in that territory constantly made recommendations that the Government make some provision to furnish them with means of aiding the Indians, by furnishing them with food and supplies which would have the effect of bringing about peace and friendship among the Indians. They also recommended that a treaty be entered into with the Shoshone Indians which would provide for care of the Indians and the safety of the emigrants and settlers. These officers were positive in their assertions that this would bring about a condition of permanent peace and friendship with the Indians, because they had found that all the Shoshone Indians with whom they had come in contact in their travels sincerely desired peace. The Commissioner of Indian Affairs and the Secretary of Interior in their annual reports

to Congress from 1850 forward made similar recommendations to the Congress. However, it was not until 1862 that any steps were taken by Congress to this end, when, by the Act of July 5, 1862, 12 Stat. 512, 529, being an act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various other Indian tribes, the Congress appropriated $20,000 "for defraying the expenses of negotiating a treaty with the Shoshonees or Snake Indians, or so much thereof as may be needed, to be expended under the direction of the Secretary of the Interior."

On February 26, 1862, prior to the passage of the appropriation act of July 5, the Secretary of the Interior wrote the chairman of the House Committee of Indian Affairs in part as follows:

> The Acting Commissioner of Indian Affairs has submitted to this Department a resolution of the House of Reps of the 30th ult°, instructing your Committee to "inquire into the expediency of making an appropriation to defray the expenses of holding treaties with the Indians in Utah, with a view to the purchase of their lands," &c. I return the resolution, and enclose herewith, a copy of the report of the Acting Comm'r, dated the 25th ins't containing the views of that officer as to the necessity and propriety of negotiating with the Indian Tribes of Utah, the expense of which will, it is estimated, be $45,000. * * *
>
> The lands owned by the Indians are, most of them, unfit for cultivation, and it is not probable that any considerable portion of them will be required for settlement for many years. The principal inducement to make treaties with those tribes is the control which the Government would thereby be enabled to exercise over them, by which additional security would be given to settlers in the Territory, and to the Overland Mail and Telegraph Lines.
>
> How far it will be proper to incur expense with a view to this obejct, is a matter which must be confided to the judgment of Congress.

5. Pursuant to the appropriation act of July 5, the President appointed a special commission consisting of James Duane Doty, Superintendent of Indian Affairs for the Territory of Utah, later Governor of that Territory, Luther

Mann, Indian agent in the same Territory, and Henry Martin, a former superintendent of Indian Affairs for Utah Territory. The failure of Commissioner Martin to reach Utah with provisions and presents in time to meet the Indians before cold weather set in delayed negotiations until June of 1863. Commissioner Martin returned to Washington, after which Commissioners Doty and Mann, assisted by General P. Edward Connor and Governor James W. Nye, concluded the negotiations at a later date, as will hereinafter appear.

6. On July 22, 1862, the Commissioner of Indian Affairs gave Commissioners Doty, Mann, and Martin a letter of instructions as follows:

> Congress at its recent Session having appropriated Twenty Thousand Dollars for the purpose of making a treaty with the Shoshonees or Snake Indians, you have been designated by the President to carry into effect the object of the said appropriation. No sufficient reports of explorations are in the custody of this office to enable me to state definitely the boundaries of the country inhabited and claimed by these Indians, but it is understood that they inhabit the country in the northern part of Utah and eastern portion of Washington Territories, through which lies the route of the overland mail, and the emigrant route through Utah and into Washington Territory and it is mainly to secure the safety of the travel along these routes that a treaty is desirable.
>
> It is not expected that the treaty will be negotiated with a view to the extinguishment of the Indian title to the land, but it is believed that with the assurances you are authorized to make of the amicable relations which the United States desires to establish and perpetuate with them, and by the payment of Twenty thousand dollars of annuities in such articles as by the President may be deemed suitable to their wants for which you are authorized to stipulate, you will be enabled to procure from them such articles of agreement as will render the routes indicated secure for travel and free from molestation; also a definite acknowledgment as well of the boundaries of the entire country they claim, as of the limits within which they will confine themselves, which limits it is hardly necessary to state should be as remote from said routes as practicable.

It must however be borne in mind that in stipulating for the payment of annuities the sum mentioned above is not to be exceeded, so that if for any reason, you are unable to treat with all the bands of the Shoshonees, the amount of annuities stipulated to be paid must be such a proportion of said sum as the number of the bands treated with bears to the number of the entire nation.

It will also be well so to frame the treaty that while on the one hand it is expressed that the United States being aware of the inconvenience resulting to the Indians in consequence of the driving away and destruction of the game along the route traveled by whites, are willing to fairly compensate them for the same, the Indians on the other hand shall acknowledge the reception of the annuities stipulated for, as a full equivalent therefor, and shall pledge themselves at all times hereafter to refrain from depredations and maintain peaceable relations with the United States and their citizens.

Should you find it impracticable to make one treaty which will secure the good will and friendship of all the tribes or bands of Shoshonee Indians, you will then negotiate only with that tribe or band which is most dangerous to emigrants and settlers upon the route of travel to the Pacific, which has the largest amount of travel over it. Although the safe transmission of the mails is an important object yet it is less important than the preservation of the lives of the emigrants.

If therefore you shall find it impracticable with the means at your disposal to make a treaty which shall afford complete protection to the route of travel over which the mails are carried and also the overland route of travel north of that, and you can only secure protection for one of said routes, you will negotiate a treaty with such tribe or bands as will secure that protection to the route over which the largest amount of travel and emigration passes without reference to the mails.

I have to direct that you arrange the times and places of your councils with the Indians that so far as practicable the entire nation shall be represented, which it is presumed the amount appropriated will with proper economy enable you to very nearly if not completely accomplish.

Mr. Martin, one of your Commissioners having filed the necessary bond, has been entrusted with the funds and will make all such arrangements for the purchase of goods and disbursement of money as may be necessary.

7. By reason of the inability of the treaty commissioners to proceed with the performance of their mission of meeting and negotiating with the Shoshone Indians, attacks and depredations were made upon the emigrants and white settlers by some bands of the Shoshone Indians during the winter of 1862–1863 with the result that in January 1863 Colonel Connor, commanding the Military District of Utah, learning of the encampment on the bank of the Bear river in southeastern corner of Idaho of a large body of Indians composed of some of the Indians of plantiff bands, attacked them in force and killed 224; a band of Indians under Sanpitz, one of the signers of the treaty subsequently made with plaintiff bands, as hereinafter mentioned, was almost exterminated.

8. June 1, 1863, the Commissioner of Indian Affairs wrote to Mr. Doty, Superintendent of Indian Affairs for the Territory of Utah and chairman of the Treaty commissioners, as follows:

> I have to acknowledge the receipt of your letter of 30th March last in relation to the proposed Treaty with the Shoshonees.
>
> I exceedingly regret that unforeseen circumstances have combined to cause so much delay in the attempt to effect the contemplated negotiations. From the instruction forwarded to late Special Agent Martin in February last I had reason to suppose that fund would be at the disposal of yourself and Agent Mann so that a council with the Indians could be held early in the Spring. In this however I was disappointed as late Agent Martin returned bringing with him the unexpended balance of the funds entrusted to him.
>
> An answer to your letter has been delayed some days with a view to consulting with Gov. Nye (who has been expected in this City) in relation to the Treaty. As it is now probable that Gov. Nye will not now visit this place I have to inform you that the balance of the funds returned by late Agent Martin amounting to the sum of $15,783.88 will be deposited to your credit with John I. Cisco Asst. Treas. U. S. at New York when notice shall be received from you as to the time that the negotiation will be attempted, and that the funds are needed for that purpose.
>
> Agent Martin having wholly failed in accomplishing the object of his appointment, the negotiation will

henceforth be confided to you and Agent Mann under the instructions heretofore issued, unless it shall be found practicable, and in your judgment expedient to associate with you Gov. Nye of Nevada and Gov. Wallace of the New Territory of Idaho in addition to Agent Mann, in which event you will be authorized to do so, but I suggest that no great delay, nor any considerable expense should be incurred for the purpose.

In regard to the suggestions of your letter of 27th Nov. last in relation to the necessity of treaties with the Utahs and Bannucks I have to state that you are authorized to make a joint treaty with these tribes and the Shoshones if one can be negotiated with the funds appropriated for the purpose of treating with the latter and now at your disposal. While I do not hesitate in view of the urgent necessities of the case and the weighty reasons therefor suggested by you to divert the specific application of the appropriation to the extent indicated, I do not feel warranted in attempting a negotiation with the Utahs and Bannucks in advance of an appropriation, unless it shall be found practicable to accomplish it as above indicated.

In view of the limited amount of the appropriation it is exceedingly vexatious that so much thereof should have been expended by late Agent Martin to so little purpose and that the necessity for the exercise of the strictest economy should thereby be enhanced to so great an extent. I have however full confidence that whatever is practicable will be accomplished by yourself and those who may be associated with you.

Trusting that I may receive an early and favorable report from you I remain

On June 20, 1863, Commissioner Doty wrote the Commissioner of Indian Affairs as follows:

I have the honor to acknowledge the receipt of your letter, dated May 22, 1863, in relation to my northern expedition, and to report:

That I returned to this city from that expedition on the 19th instant, having been absent six weeks in the Indian country, and travelled over eight hundred miles. I accompanied General Conner to Snake River Ferry, two hundred miles, where we separated, and he proceeded with his cavalry up the Blackfoot river, and south across the dividing ridge to Soda Springs, at which he has established a military post, on the old California and Oregon roads. The Bannacks and Sho-

shonees I met in small bands, and after consulting with them, I am satisfied they are disposed to be peaceable and friendly. The exhibition of a cavalry force among them apparently satisfied them that they could be reached by the power of the government, and that they would certainly be punished if they committed depredations upon white men. There are, undoubtedly, as they say, some bad men among them, who will not be controlled by the chiefs, but efforts are made by the peaceable Indians to restrain them. The only bands that appear determined to continue hostilities were those of Pokatelo, Sagowitz, and Sanpitz, and with these I could obtain no communication. They must be left to General Conner's troops.

When at Snake River ferry, two express-men arrived, bringing information that a large body of Shoshonees and Bannacks were assembled at Kamash prairie, about one hundred miles further north, on the road used by emigrants to Bannack city, with the intention to either fall upon the miners on Beaver Head and its branches, or upon the emigrants along the road between South Pass and Bridger. If this could be prevented by an interview, I felt it my duty to make the attempt, and therefore proceeded with my interpreter to the place indicated to meet them. At Kamash prairie I found but few Indians—those remaining stating that those who had been there had gone in different directions to the mountains to hunt, and that they were all friendly to the whites, and disposed to be peaceable. They complained of the white men at Bannack city firing upon them in the streets of that place, when they were there upon a friendly visit, and molesting no one, and killed their chief, Shanog, and two others. They said they did not intend to revenge this wanton act, because it was committed by men who were drunk, and they thought all the people there were drunk at the time. I advised them not to go there again, and to keep away from drunken white men; to be kind, and render good service to the emigrants along the road, and that they would be generously rewarded. I gave them a few presents of blankets, &c. However, fearing there might be trouble from this gross attack, and that other bands might not be disposed to overlook it, I determined, as there was no Indian agent in this section of country, to proceed to Bannack city, about eighty miles distant, to ascertain the truth of their statement, and to counsel with those who might be along the road through the mountains. On entering the mountains I encountered

a large band of Shoshonees, who manifested a friendly spirit, expressed a desire to be at peace, and thankfully accepted the few presents I was able to make them. On arriving at Bannack I learned with regret that the statement by the Indians of the murder of their people was true; that they were fired upon as they were sitting quietly in the street, by a dozen white men, and that their sole object in visiting the place was to give up a child—which they did—which had been demanded of them on the supposition that it was a stolen white child. I saw the child, and have no doubt that it is a half-breed, and was rightfully in their possession. I would have adopted legal measures for the punishment of these offenders, but there were no civil officers there, and no laws but such as have been adopted by miners. The matter must rest until the organization of the government of Idaho.

Whilst at Bannack, I ascertained that bands of Flat-heads had passed on the road by which I came, in search of the Bannacks and Shoshonees, for the purpose of stealing their horses and making war upon them. Deeming it unsafe to return alone, I employed Mr. Dempsey, an excellent interpreter, to send a guide and guard of Indians with me. These accompanied me faithfully to the settlement of Box Elder, and will, on their way back, give useful information to those of their nation they meet.

All the Indians I met, during my absence, appeared desirous to form a treaty with the United States, and I told them that when the commissioners were ready to meet them I would send a runner to them to inform them of the time and place for them to assemble.

On the same date Commissioner Doty wrote to the Commissioner of Indian Affairs another letter as follows:

Your letter of instructions in relation to the proposed treaty with the Shoshones, dated June 1, 1863, I have the honor to acknowledge, and to inform you that I shall proceed the coming week to Fort Bridger for the purpose of meeting the Shoshonees who are assembled there, some of whom I met on my late expedition, and of treating with them according to your instructions of the 22d of July, 1862, and of those now given.

Many of these Indians have been hostile, and have committed depredations upon the persons and property of emigrants and settlers, but now express a strong desire for peace. Agent Mann informs me that he is

now feeding them under your authority; I therefore hasten to meet them, that some arrangement may be made by which they can with satisfaction return to their hunting grounds, and upon terms which shall secure peace hereafter, safety to the emigrants and travellers, and relieve the department from the expense now being incurred.

These are about one-third of the Shoshones with whom treaties may be held, and I shall endeavor to limit the expenditures to the least amount to obtain the objects desired by government.

* * * * *

The Shoshonee Bands are scattered over so vast an extent of country that it will be necessary for the commissioners to meet them at several points. The whole nation can never be assembled without bringing them hundreds of miles.

9. Following June 20, 1863, the Government's treaty commissioners met with the Shoshone Tribe of Indians and the Bannock bands in groups at different points and on different dates between July 2 and October 14, 1863, as hereinafter mentioned, and made treaties with them. The treaty commissioners first met at Ft. Bridger, Wyoming, with Washakie, the principal chief of the entire Shoshone Tribe of Indians, and the chiefs, principal men, and warriors of the Indians with him, where they entered into a treaty (18 Stat. 685) as follows:

Eastern Shoshone Treaty

Articles of Agreement made at Fort Bridger, in Utah Territory, this 2d day of July, A. D. 1863, by and between the United States of America, represented by its Commissioners, and the Shoshone Nation of Indians, represented by its Chiefs and Principal Men and Warriors of the Eastern Bands, as follows:

Article I

Friendly and amicable relations are hereby reestablished between the bands of the Shoshonee nation, parties hereto, and the United States; and it is declared that a firm and perpetual peace shall be henceforth maintained between the Shoshonee nation and the United States.

Article II

The several routes of travel through the Shoshonee country, now or hereafter used by white men, shall be and remain forever free and safe for the use of the government of the United States, and of all emigrants and travellers under its authority and protection, without molestation or injury from any of the people of said nation. And if depredations should at any time be committed by bad men of their nation, the offenders shall be immediately seized and delivered up to the proper officers of the United States, to be punished as their offences shall deserve; and the safety of all travellers passing peaceably over said routes is hereby guaranteed by said nation. Military agricultural settlements and military posts may be established by the President of the United States along said routes; ferries may be maintained over the rivers wherever they may be required; and houses erected and settlements formed at such points as may be necessary for the comfort and convenience of travellers.

Article III

The telegraph and overland stage lines having been established and operated through a part of the Shoshonee country, it is expressly agreed that the same may be continued without hindrance, molestation, or injury from the people of said nation; and that their property, and the lives of passengers in the stages, and of the employees of the respective companies, shall be protected by them.

And further, it being understood that provision has been made by the Government of the United States for the construction of a railway from the plains west to the Pacific ocean, it is stipulated by said nation that said railway, or its branches, may be located, constructed, and operated, without molestation from them, through any portion of the country claimed by them.

Article IV

It is understood the boundaries of the Shoshonee country, as defined and described by said nation, is as follows: On the north, by the mountains on the north side of the valley of Shoshonee or Snake River; on the east, by the Wind River mountains, Peenahpah river, the north fork of Platte or Koo-chin-agah, and the north Park or Buffalo House; and on

the south, by Yampah river and the Uintah mountains. The western boundary is left undefined, there being no Shoshonees from that district of country present; but the bands now present claim that their own country is bounded on the west by Salt Lake.

Article V

The United States being aware of the inconvenience resulting to the Indians in consequence of the driving away and destruction of game along the routes travelled by whites, and by the formation of agricultural and mining settlements, are willing to fairly compensate them for the same; therefore, and in consideration of the preceding stipulations, the United States promise and agree to pay to the bands of the Shoshonee nation, parties hereto, annually for the term of twenty years, the sum of ten thousand dollars, in such articles as the President of the United States may deem suitable to their wants and condition, either as hunters or herdsmen. And the said bands of the Shoshonee nation hereby acknowledge the reception of the said stipulated annuities, as a full compensation and equivalent for the loss of game, and the rights and privileges hereby conceded.

Article VI

The said bands hereby acknowledge that they have received from said Commissioners provisions and clothing amounting to six thousand dollars, as presents, at the conclusion of this treaty.

This treaty was designated by the commissioners as an agreement with the "Eastern Bands" of the Shoshone Nation of Indians for the reason that the bands of Indians present and participating therein were located in the eastern portion of the territory inhabited or occupied by the Indians of the Shoshone Nation. Ft. Bridger, the place where the treaty was made, was located near the southwestern corner of Wyoming, east of the Porteneuf range of mountains. This treaty was transmitted to the Commissioner of Indian Affairs by the treaty commissioners with a letter of July 3, 1863, as follows:

We have the honor to transmit herewith a Treaty which we concluded yesterday with the Shoshonee

nation, which we hope will be approved by the Department. The terms were more advantageous than we had expected to obtain.

The representation of the nation was very large, being from all the bands of the nation except four. The parties treating occupy the whole of the country east of—and including—Salt Lake valley. The two principal chiefs of the nation, Washakee and Wanapitz, were present.

One of these absent Bands is in Ruby valley and on the Humboldt mountains and river. The other three continue their hostilities, but are now much reduced in numbers, and have been driven by the Troops north to the valley of Snake river. We may now perhaps be able to get messengers to them, and induce them to treat with us for peace.

The amount expended in making this Treaty, is about six thousand dollars; the account, with the vouchers, will be forwarded without delay. There was near one thousand Shoshonees—and no Bannacks or Utahs—on the ground. They have been fed, according to your instructions, for the past month, which has somewhat increased the expenditure of the Treaty fund, to which it is charged.

10. Thereafter, on July 30, the treaty commissioners assembled at Box Elder, in Utah Territory, and met with plaintiff bands of the Shoshone nation or tribe which inhabited and occupied the territory west of the range of mountains above mentioned and the territory occupied and possessed by Chief Washakie and the bands with whom the treaty of July 2 had been made. The commissioners there made a treaty which was signed on behalf of these Indians by Pocatello, chief of one of the bands, and eight chiefs of other bands of the Shoshone tribe. Pocatello was regarded as the principal chief under Washakie of this group of bands. These Indians were designated by the treaty commissioners and by the treaty entered into as the "Northwestern Bands" of Shoshone Indians. This treaty (13 Stat. 663) was as follows:

Northwestern Shoshone Treaty

Articles of agreement made at Box Elder, in Utah Territory, this 30th day of July, A. D., 1863, by and between

the United States of America, represented by Brigadier General P. Edward Connor, commanding the military district of Utah, and James Duane Doty, commissioner, and the northwestern bands of the Shoshonee Indians, represented by their chiefs and warriors:

ARTICLE I. It is agreed that friendly and amicable relations shall be reestablished between the bands of the Shoshonee Nation, parties hereto, and the United States, and it is declared that a firm and perpetual peace shall be henceforth maintained between the said bands and the United States.

ARTICLE II. The treaty concluded at Fort Bridger on the 2nd day of July, 1863, between the United States and the Shoshonee Nation, being read and fully interpreted and explained to the said chiefs and warriors, they do hereby give their full and free assent to all of the provisions of said treaty, and the same are hereby adopted as a part of this agreement, and the same shall be binding upon the parties hereto.

ARTICLE III. In consideration of the stipulations in the preceding articles, the United States agree to increase the annuity to the Shoshonee Nation five thousand dollars, to be paid in the manner provided in said treaty. And the said northwestern bands hereby acknowledge to have received of the United States, at the signing of these articles, provisions and goods to the amount of two thousand dollars, to relieve their immediate necessities, the said bands having been reduced by the war to a state of utter destitution.

ARTICLE IV. The country claimed by Pokatello, for himself and his people, is bounded on the west by Raft River and on the east by the Porteneuf Mountains.

This treaty was transmitted by the treaty commissioners with a letter of July 30, 1863, from Commissioner Doty to the Commissioner of Indian Affairs, as follows:

> A treaty of peace was this day concluded at this place by General Connor and myself with the bands of the Shoshones, of which Pocatello, San Pitch [Sanpitz], and Sagwich are the principal chiefs. This information is given that these Shoshones may not be injured when met by the troops, if they are at the time behaving

themselves well. A treaty of peace has also been entered into at Fort Bridger with other bands of the Shoshones, and it is understood that all of that nation are at peace with the United States and are under a pledge to remain friendly.

11. Thereafter on October 1, 1863, the commissioners assembled and met with the bands of the Shoshone Nation of Indians at Ruby Valley in what is now northeastern Nevada, which Indians occupied and possessed an area of country in the northeastern portion of the territory of Nevada, and there entered into a treaty with these bands with a letter of July 30, 1863, from Commissioner Doty to the Commissioner of Indian Affairs as follows:

Western Shoshone Treaty

Treaty of Peace and Friendship made at Ruby Valley, in the Territory of Nevada, this 1st day of October, A. D., 1863, between the United States of America, represented by the undersigned commissioners, and the Western Bands of the Shoshonee Nation of Indians, represented by their Chiefs, and Principal Men and Warriors, as follows:

Article I

Peace and friendship shall be hereafter established and maintained between the Western Bands of the Shoshonee nation and the people and Government of the United States; and the said bands stipulate and agree that hostilities and all depredations upon the emigrant trains, the mail and telegraph lines, and upon the citizens of the United States within their country, shall cease.

Article II

The several routes of travel through the Shoshonee country, now or hereafter used by white men, shall be forever free, and unobstructed by the said bands, for the use of the government of the United States, and of all emigrants and travelers under its authority and protection, without molestation or injury from them. And if depredations are at any time committed by bad men of their nation, the offenders shall be immediately taken and delivered up to the proper officers

of the United States, to be punished as their offences shall deserve; and the safety of all travelers passing peaceably over either of said routes is hereby guaranteed by said bands.

Military posts may be established by the President of the United States along said routes or elsewhere in their country; and station houses may be erected and occupied at such points as may be necessary for the comfort and convenience of travelers or for mail or telegraph companies.

Article III

The telegraph and overland stage lines having been established and operated by companies under the authority of the United States through a part of the Shoshonee country, it is expressly agreed that the same may be continued without hindrance, molestation, or injury from the people of said bands, and that their property and the lives and property of passengers in the stages and of the employes of the respective companies, shall be protected by them. And further, it being understood that provision has been made by the government of the United States for the construction of a railway from the plains west to the Pacific ocean, it is stipulated by the said bands that the said railway or its branches may be located, constructed, and operated, and without molestation from them, through any portion of the country claimed or occupied by them.

Article IV

It is further agreed by the parties hereto, that the Shoshonee country may be explored and prospected for gold and silver, or other minerals; and when mines are discovered, they may be worked, and mining and agricultural settlements formed, and ranches established whenever they may be required. Mills may be erected and timber taken for their use, as also for building or other purposes in any part of the country claimed by said bands.

Article V

It is understood that the boundaries of the country claimed and occupied by said bands are defined and described by them as follows:

On the north by Wong-goga-da Mountains and Shoshonee River Valley; on the west by Su-non-to-yah

Mountains or Smith Creek Mountains; on the south by Wi-co-bah and the Colorado Desert; on the east by Po-ho-no-be Valley or Steptoe Valley and Great Salt Lake Valley.

Article VI

The said bands agree that whenever the President of the United States shall deem it expedient for them to abandon the roaming life, which they now lead, and become herdsmen or agriculturalists, he is hereby authorized to make such reservations for their use as he may deem necessary within the country above described; and they do also hereby agree to remove their camps to such reservations as he may indicate, and to reside and remain therein.

Article VII

The United States, being aware of the inconvenience resulting to the Indians in consequence of the driving away and destruction of game along the routes traveled by white men, and by the formation of agricultural and mining settlements, are willing to fairly compensate them for the same; therefore, and in consideration of the preceding stipulations, and of their faithful observance by the said bands, the United States promise and agree to pay to the said bands of the Shoshonee nation parties hereto, annually for the term of twenty years, the sum of five thousand dollars in such articles, including cattle for herding or other purposes, as the President of the United States shall deem suitable for their wants and condition, either as hunters or herdsmen. And the said bands hereby acknowledge the reception of the said stipulated annuities as a full compensation and equivalent for the loss of game and the rights and privileges hereby conceded.

Article VIII

The said bands hereby acknowledge that they have received from said commissioners provisions and clothing amounting to five thousand dollars as presents at the conclusion of this treaty.

12. Thereafter, on October 12, 1863, the treaty commissioners assembled and met with the Shoshonee-Goship Bands of Indians belonging to and affiliated with the Shoshone

Nation of Indians at Tuilla Valley, just south of Great Salt Lake in what is now the northeastern portion of Utah. These bands of Indians occupied a territory lying in western Utah and eastern Nevada, south of Salt Lake and south of the territory occupied by the Northwestern Bands and east of that occupied by the Western Bands of Shoshones. This treaty (13 Stat. 681) was as follows:

Shoshonee-Goship Treaty

Treaty of peace and friendship made at Tuilla Valley, in the Territory of Utah, this 12th day of October, A. D. 1863, between the United States of America, represented by the undersigned commissioners, and the Shoshonee-Goship bands of Indians, represented by their chiefs, principal men, and warriors, as follows:

ARTICLE I. Peace and friendship is hereby established and shall be hereafter maintained between the Shoshonee-Goship bands of Indians and the citizens and Government of the United States; and the said bands stipulate and agree that hostilities and all depredations upon the emigrant trains, the mail and telegraph lines, and upon the citizens of the United States, within their country, shall cease.

ARTICLE II. It is further stipulated by said bands that the several routes of travel through their country now or hereafter used by white men shall be forever free and unobstructed by them, for the use of the Government of the United States, and of all emigrants and travellers within it under its authority and protection, without molestation or injury from them. And if depredations are at any time committed by bad men of their own or other tribes within their country, the offenders shall be immediately taken and delivered up to the proper officers of the United States, to be punished as their offences may deserve; and the safety of all travellers passing peaceably over either of said routes is hereby guaranteed by said bands.

Military posts may be established by the President of the United States along said routes, or elsewhere in their country; and station-houses may be erected and occupied at such points as may be necessary for the comfort and convenience of travellers or for the use of the mail or telegraph companies.

ARTICLE III. The telegraph and overland stage lines having been established and operated by companies under the authority of the United States through the country occupied by said bands, it is expressly agreed that the same may be continued without hindrance, molestation, or injury from the people of said bands, and that their property, and the lives and property of passengers in the stages, and of the employees of the respective companies, shall be protected by them.

And further, it being understood that provision has been made by the Government of the United States for the construction of a railway from the plains west to the Pacific Ocean, it is stipulated by said bands that the said railway or its branches may be located, constructed, and operated, and without molestation from them, through any portion of the country claimed or occupied by them.

ARTICLE IV. It is further agreed by the parties hereto that the country of the Goship tribe may be explored and prospected for gold and silver, or other minerals and metals; and when mines are discovered they may be worked, and mining and agricultural settlements formed and ranches established wherever they may be required. Mills may be erected and timber taken for their use, as also for building and other purposes, in any part of said country.

ARTICLE V. It is understood that the boundaries of the country claimed and occupied by the Goship tribe, as defined and described by said bands, are as follows: On the north by the middle of the Great Desert; on the west by Steptoe Valley; on the south by Tooedoe or Green Mountains; and on the east by Great Salt Lake, Tuilla, and Rush Valleys.

ARTICLE VI. The said bands agree that whenever the President of the United States shall deem it expedient for them to abandon the roaming life which they now lead, and become settled as herdsmen or agriculturalists, he is hereby authorized to make such reservations for their use as he may deem necessary; and they do also agree to remove their camps to such reservations as he may indicate, and to reside and remain thereon.

ARTICLE VII. The United States being aware of the inconvenience resulting to the Indians, in consequence of the driving away and destruction of game along the routes travelled by white men, and by the formation of agricultural and mining settlements, are willing to fairly compensate them for the same. Therefore, and in consideration of the preceding stipulations, and of

their faithful observance by said bands, the United States promise and agree to pay to the said Goship tribe, or to the said bands, parties hereto, at the option of the President of the United States, annually, for the term of twenty years, the sum of one thousand dollars, in such articles, including cattle for herding or other purposes, as the President shall deem suitable for their wants and condition either as hunters or herdsmen. And the said bands, for themselves and for their tribe, hereby acknowledge the reception of the said stipulated annuities as a full compensation and equivalent for the loss of game and the rights and privileges hereby conceded; and also one thousand dollars in provisions and goods at and before the signing of this treaty.

13. Thereafter, on October 14, 1863, the treaty commissioners assembled and met at Soda Springs, in what is now eastern Idaho, with certain bands of Bannocks and Shoshone Indians designated by the treaty commissioners as "the mixed bands of Bannocks and Shoshonees," and entered into a treaty with them, which treaty was signed by thirteen chiefs of these bands. This treaty (5 Kapp. 693) was as follows:

Mixed Bands Treaty

Treaty of peace and friendship, made at Soda Springs, in Idaho Territory, this 14th day of October A. D., 1863, by and between the United States of America, represented by Brigadier General P. Edward Connor, commanding the military district of Utah, &c., and James Duane Doty, commissioner, and the undersigned chiefs of the mixed bands of Bannacks and Shoshonees, occupying the valley of Shoshonee River, as follows:

Article I

It is mutually agreed that friendly and amicable relations shall be reestablished between the said Bands and the United States, and that a firm and perpetual peace shall be henceforth maintained between the said bands and the United States.

Article II

The treaty concluded at Fort Bridger, on the second day of July, 1863, between the United States and the

Shoshonee nation, and also the treaty concluded at Box Elder, on the 30th day of July 1863, between the United States and the Northwestern bands of the Shoshonee nation, being read and fully interpreted and explained to the said chiefs, they do hereby give their full and free assent to all of the provisions of said treaties, and the same are hereby adopted as a part of this treaty, and the same shall be binding upon the parties hereto, the said bands sharing in the annuities therein provided for the Shoshonee nation.

Article III

The said bands, in addition, agree that the roads now used by white men between Soda Springs and the Beaver Head mines, and between Salt Lake and the Boise River mines, as also such other roads as it may be necessary or convenient for the white men to make and use between said places, or between other points within their country, shall at all times be free and safe for travel; and no depredations shall be committed upon white men in any part of their country. And the said bands hereby acknowledge to have received of the United States, by its commissioner, at the signing of these articles, provisions, and goods, to the amount of three thousand dollars, to relieve their immediate wants before their departure to their hunting grounds.

Article IV

The country claimed by the said bands jointly with the Shoshonee nation, extends, as described by them, from the lower part of Humboldt river and the Salmon Falls, on Shoshonee river, easterly to the Wind River mountains.

14. On August 30, 1863, after the five treaties hereinbefore mentioned had been made with the Shoshone Indians, Treaty Commissioner James Duane Doty wrote the Commissioner of Indian Affairs a letter as follows:

Acknowledging your letter dated July 22d I have to request that two or more copies of the Map lately prepared at the General Land Office may be procured and sent to me, that I may be enabled to show the boundaries of the Country ceded by the Shoshonees. The most accurate map which I have of this country is the Military Map of Utah; but this does not exhibit the northern part of the Shoshonee Country.

September 22, 1863, the Commissioner of Indian Affairs replied and transmitted copies of the map requested. November 10, 1863, Commissioner Doty wrote the Commissioner of Indian Affairs as follows:

> The map transmitted to me by the department is herewith returned, with the exterior boundaries of the territory claimed by the Shoshonees in their recent treaties, as also the lines of the country occupied by different portions of the tribe, indicated upon it as correctly as the map will allow. They fixed their eastern boundary on the crest of the Rocky Mountains; but it is certain that they, as well as the Bannacks, hunt the buffalo below the Three Forks of the Missouri, and on the headwaters of the Yellowstone and Wind rivers.
>
> As none of the Indians of this country have permanent places of abode, in their hunting excursions they wander over an immense region, extending from the fisheries at and below Salmon Falls, on the Shoshonee river, near the Oregon line, to the sources of that stream, and to the buffalo country beyond. The Shoshonees and Bannacks are the only nations which, to my knowledge, hunt together over the same ground.
>
> Replying further to your letter, dated July 22, 1863, I beg leave to refer to my letter to the Commissioner, dated February 7, 1862, in relation to the Indian tribes in this superintendency; and to add that the bands represented at the treaty of Fort Bridger, on the second day of July last, it was estimated, numbered between three and four thousand souls, over a thousand of whom were present at, and immediately after, the conclusion of the treaty.
>
> They are known as Waushakee's band, (who is the principal chief of the nation,) Wonapitz's band, Shauwuno's band, Tibagon's band, Peoastoagah's band. Totimee's band, Ashingodimah's band, (he was killed at the battle on Bear river), Sagowitz's band, (wounded at the same battle,) Oretzimawik's band, Bazil's band, Sanpitz's band. The bands of this chief and of Sagowitz were nearly exterminated in the same battle.
>
> The chiefs at this treaty, in fact, represented nearly the whole nation; and they were distinctly informed and they agreed that the annuities provided in this treaty, and such others as might be formed, were for the benefit of all the bands of the Shoshonee nation who might give their assent to their terms; and this has been the understanding at each treaty.

At the treaty concluded at Box Elder on the 30th of July, the first object was to effect and secure a peace with Pokatello, as the road to Beaver Head gold mines, and those on Boisé river, as well as the northern California and southern Oregon roads, pass through his country. There were present Pokatello's band, Tormontso's band, Sanpitz's band, Tosorvetz's band, Bear Hunter's band, (all but seven of this band were killed at Bear river battle,) Sagowitz's band. This chief was shot by a white man a few days before the treaty, and could not come from his *weekeeup* to the treaty ground, but he assented to all of its provisions. He and Sanpitz endeavored to be at Fort Bridger, to unite in the treaty there, but did not arrive in time. The chiefs of several smaller bands were also present and signed the treaty, which is considered of more importance than any made this season, in saving the lives and securing from depredations the property of our citizens, emigrants as well as others. These bands are generally known as "the Sheep-Eaters," and their number is estimated at one thousand.

At the treaty concluded at Ruby valley, on the 1st of October, the western Shoshonees were represented by the two principal bands, the Tosowitch (White Knife) and Unkoahs. From the best information I could get I estimated the western bands, sometimes called Shoshonee Diggers, at twenty-five hundred souls; but the bands on the Lower Humboldt and west of Smith's creek are not included in this estimate. Governor Nye proposed to meet some of them at Reese river, on his return to Carson from Ruby.

At the treaty at Tuilla valley, on the 12th of October, with the Goship or Kumumbar bands, who are connected with the Shoshonees, and are chiefly of that tribe, there were three hundred and fifty present. Others from Ibapah, Shell creek, and the Desert, would have joined them but for their fear of the soldiers; they number about one hundred more; and there is also a portion of this tribe who are mixed with the Pahvontee tribe, and occupy the southern part of the Goship country, amounting to two hundred more. They are the poorest and most miserable Indians I have met; they have neither horses nor guns. I have seen several of them at work for farmers at Deep creek and Grantsville, and therefore conclude that they would soon learn to cultivate the ground for themselves, and take care of stock, if they were assisted in a proper way. They have expressed a strong desire to become settled

as farmers, and I should be glad to see them located as such, at a distance from the overland mail route. More than a hundred of them have been killed by the soldiers during the past year, and the survivors beg for peace. It was the intention and understanding that all of the Goship tribe shall participate in the benefits of the treaty.

At the treaty of Soda Springs, on the 14th of October, with the mixed bands of Shoshonees and Bannacks roaming in the valley of Shoshonee river, there were one hundred and fifty men present with their families.

Tindoah and the chiefs of several other bands sent word that they assented to the treaty, and desired to be considered parties to it, but they could not remain, as it was so late in the season they were compelled to leave for their buffalo hunting-grounds. I have seen these bands on Snake river, in the month of May last, in council, found them peaceable and friendly, and explained to them the objects for which it was proposed to hold a treaty before the snow fell.

Those now present were, Toso-kwauberaht, the principal chief of the Bannack nation, commonly known as Grand Coquin, Tahgee, Matigund, and other principal men. This last chief and his band live at the Shoshonee River ferry, where he meets all the travelers to and from the mines. He has always been friendly to them; and all of these bands can render great service to the emigrants, or do them great injury. They number about one thousand souls, as near as I can ascertain.

The whole number of Shoshonee, Goships, and Bannacks, who are parties to these treaties, may be estimated at eight thousand six hundred and fifty.

The amount to be paid to them annually in goods, &c., is—to the Shoshonees and Bannacks twenty thousand dollars and to the Goships one thousand dollars, for the term of twenty years. This last sum I think ought to be increased to two thousand dollars, especially if they are to be settled as husbandmen or herdsmen.

The importance of these treaties to the government and to its citizens can only be appreciated by those who know the value of the continental telegraph and overland stage to the commercial and mercantile world, and the safety and security which peace alone can give to emigrant trains, and to the travel to the gold discoveries in the north, which exceed in richness—

at least in the quality of the gold—any discoveries on this continent.

The pertinent portion of the map referred to and transmitted by Commissioner Doty with the above-quoted letter, showing the approximate exterior boundaries estimated by him is reproduced on the following page. The word "North" has been written on the map by the court for the purpose of this opinion. The heavy line thereon was intended to represent the approximate exterior boundary of the entire territory in which the entire Shoshone tribe of Indians and the Bannock bands of Indians affiliated with them had been found to live, roam and hunt, and, to some extent, claimed or described by them as set forth in the treaties. The smaller lines on the map in the southwest portion thereof were intended to indicate approximately the territory described (1) by Pocatello, (2) the Western Bands, and (3) the Shoshonee-Goship Bands.

15. In negotiating and making these five treaties with the various groups or bands of Shoshone and Bannock Indians, the treaty commissioners representing the United States and the Indians did not negotiate or agree with reference to the acknowledgment by the United States of any exclusive use and occupancy right or title of the Indians to the territory to the extent described or claimed by them at the request of the treaty commissioners; nor did the treaty commissioners on behalf of the United States negotiate or agree with the Indians with reference to the relinquishment by the Indians of any claim which they might make or have with reference to any territory. It was not the purpose of the treaty commissioners to agree or acknowledge on behalf of the United States as to any rights or title to any territory or as to boundaries and they made no attempt to ascertain accurately the boundaries of any territory which the Indians may have actually occupied, possessed and used to the exclusion of other Indians or tribes of Indians. The matter of Indian use and occupancy rights or the extinguishment of any claim or right which the Indians might make or have to such use and occupancy, as a stipulation or acknowledgment in the treaties, did not enter into the negotiations and

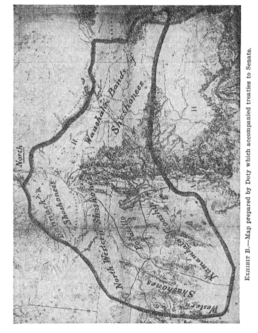


EXHIBIT B.—Map prepared by Doty which accompanied treaties to Senate.

was left out of consideration in the drafting and making of the treaties in question. The primary purpose of the United States and the treaty commissioners representing it in negotiating and making the treaties in question was to bring about peaceful and amicable relations between the Government and the Indians of the Shoshone Nation, or tribe, and the Bannock bands by making provision for annuities, in stated amounts in such articles as the President might deem suitable to their wants and conditions, to the end that routes

of travel by the whites through the portion of the country occupied by the Indians and the settlements therein by the whites might be free from attacks and depredations by the Indians.

16. The five treaties hereinbefore mentioned were transmitted to the President by the Secretary of Interior, and on or about January 5, 1864, the President transmitted the treaties to the Senate with the following communication:

> I herewith lay before the Senate, for its constitutional action thereon, the following described treaties, viz:
>
> A treaty made at Fort Bridger, Utah Territory, on the 2d day of July, 1863, between the United States and the chiefs, principal men, and warriors of the eastern bands of the Shoshonee nation of Indians;
>
> A treaty made at Box Elder, Utah Territory, on the 30th day of July, 1863, between the United States and the chiefs and warriors of the northwestern bands of the Shoshonee nation of Indians;
>
> A treaty made at Ruby Valley, Nevada Territory, on the 1st day of October, 1863, between the United States and the chiefs, principal men, and warriors of the Shoshonee nation of Indians;
>
> A treaty made at Tuilla Valley, Utah Territory, on the 12th day of October, 1863, between the United States and the chiefs, principal men, and warriors of the Goship bands of Shoshonee Indians;
>
> A treaty made at Soda Springs, in Idaho Territory, on the 14th day of October, 1863, between the United States and the chiefs of the mixed bands of Bannacks and Shoshonees, occupying the valley of the Shoshonee river;
>
> A letter of the Secretary of the Interior, of the 5th instant; a copy of a report, of the 30th ultimo, from the Commissioner of Indian Affairs; a copy of a communication from Governor Doty, superintendent of Indian affairs, Utah Territory, dated November 10, 1863, relating to the Indians parties to the several treaties herein named; and a map, furnished by that gentleman, are herewith transmitted.

17. Each of the five treaties was ratified by the Senate, and to each of the treaties made with the Eastern Shoshones on July 2, the Northwestern Shoshones July 30, the Goship-Shoshones October 12, and the mixed bands of Bannocks

and Shoshonees October 14, 1863, the Senate added the following amendment:

> Nothing herein contained shall be construed or taken to admit any other or greater title or interest in the lands embraced within the territories described in said treaty in said tribes or bands of Indians than existed in them upon the acquisition of said territories from Mexico by the laws thereof.

18. The treaty with the plaintiff bands as amended was ratified March 7, 1864. The amended treaty was in due course submitted to plaintiff bands and was ratified and accepted by them November 18, 1864, and proclaimed by the President January 17, 1865. 13 Stat. 663–665.

19. With the exception of the mixed bands of Bannocks and Shoshones, all of the bands of Shoshone Indians above mentioned assented to and accepted the amendment of the Senate to their respective treaties (13 Stat. 663, 13 Stat. 681, 18 Stat. 685, 18 Stat. 689). The mixed bands of Bannocks and Shoshones, with whom the treaty of October 14, 1863, was made and subsequently ratified by the Senate with the amendment above-mentioned, were never assembled for the purpose of obtaining their formal assent, apparently for the reason that they became so scattered as to render it impossible to assemble them; the treaty was therefore never proclaimed by the President.

20. The treaty with the Western Band of Shoshones, dated October 1, 1863, came up for consideration in the Senate at the same time, i. e. March 7, 1864, as the other four treaties. The Senate first voted to ratify the Western Shoshone treaty with the same amendment that was made to the other four treaties but, in the same executive session on the same date, the Senate voted to reconsider its action with respect to this particular treaty. While the other four Shoshone treaties were ratified March 7, 1864, as hereinbefore mentioned, the Senate did not take final action on the Western Shoshone treaty until June 26, 1866, at which time this treaty was ratified without amendment except for the filling in of the blank space in Art. 3 as to the amount of the annuity to be paid under the treaty to those Indians.

21. Prior to and at the time of the making and the ratifi-

cation of the treaty with plaintiff bands of the Shoshone Indians, the United States had not recognized and did not, at that time, recognize a right of exclusive use, occupancy, and possession in plaintiff bands as against the United States to any territory which was within the Mexican Cession and included in that described by Pocatello, and now claimed by plaintiff bands. The treaty of July 30, 1863, with plaintiff bands contained no express or implied stipulation of recognition or acknowledgment by the United States of any right, title, or interest in any land, and the United States, in making and ratifying the treaty, did not intend that it should be a stipulation of recognition and acknowledgment of any exclusive use and occupancy right or title of the Indians, parties thereto. On the contrary, the United States has ever exercised dominion and complete ownership over the territory and land for which plaintiff bands now seek to recover compensation. The treaty was intended to be, and was, a treaty of peace and amity with stipulated annuities for the purposes of accomplishing those objects and achieving that end.

22. Subsequently the following act of Congress was approved February 23, 1865; 13 Stat. 432:

> That the President of the United States be, and he is hereby, authorized, by and with the advice and consent of the Senate, to enter into treaties with the various tribes of Indians of Utah Territory, upon such terms as may be deemed just to said Indians and beneficial to the government of the United States: *Provided*, That such treaties shall provide for the absolute surrender to the United States, by said Indians, of their possessory right to all the agricultural and mineral lands in said territory except such agricultural lands as by said treaties may be set apart for reservations for said Indians: *And Provided*, *Further*, That all such reservations shall be selected at points as remote as may be practicable from the present settlements in Utah Territory.
>
> Sec. 2. *And be it further enacted*, That in agreeing with said Indians upon the amounts to be paid to them under the provisions of the treaties to be negotiated in pursuance of this act, care shall be taken to obtain from the Indians, to the greatest possible extent, their consent

to receive for such payments agricultural implements, stock, and other useful articles, rather than money.

Sec. 3. *And be it further enacted*, That for the purpose of negotiating said treaties and carrying out the treaty provisions of this act, making presents to said Indians, and defraying the necessary expenses incident to such negotiation, there is hereby appropriated, out of any money in the treasury of the United States not otherwise appropriated, the sum of twenty-five thousand dollars.

23. No further treaty or agreement was ever negotiated, made, or attempted to be made, with the plaintiff bands of Shoshone Indians or any of the other bands of the Shoshone Nation, or tribe, other than the Eastern bands of the Shoshone Tribe with which a treaty was made July 3, 1868, and was ratified February 16, 1869, and proclaimed February 24, 1869, 15 Stat. 673; (*Shoshone Tribe of Indians of the Wind River Reservation in Wyoming* v. *United States*, 85 C. Cls. 331). In this treaty these Eastern bands relinquished all title, claim, or rights in or to any and all territory of the United States except a portion of country described therein containing 3,047,730 acres in the Wind River section of the present State of Wyoming which was set apart by this treaty of 1868 for their absolute and undisturbed use and occupancy and for such other friendly tribes or individual Indians as, from time to time, they might be willing with the consent of the United States to admit amongst them.

24. After the making of the treaty of July 30, 1863, the plaintiff bands became widely scattered over northern Utah and Nevada, and southern Idaho. In 1873 the Commissioner of Indian Affairs appointed a commission to investi gate all tribes and bands in this region and to ascertain their number and the probability of gathering them upon one or more reservations where they could be more immediately under the care of the Government. The commission made an exhaustive investigation into the matters entrusted to it and reported that it had no trustworthy information as to the number of bands of the Northwestern Shoshone Indians. The commission further reported that a part of the Northwestern Shoshones under Pocatello (who signed the treaty

of July 30, 1863) had already gone to the Fort Hall (Idaho) Reservation in southeast Idaho, and that Chief Tav-i-wun-shea, with his small band, had gone to the Wind River (Wyoming) Reservation created and set apart under the treaty with the Eastern Shoshones in 1868. Toomontso (who had signed the Northwestern Treaty of July 30) and his band at about this time took up their abode on the Fort Hall Indian Reservation and an indefinite number of Indians of this band had gone to the Wind River Reservation. Eventually the remnants of the bands of Indians under San Pitz (a signer of the Northwestern Shoshone treaty of July 30), and Saigwits, also a party to the treaty, were induced by the commission to remove to the Fort Hall Indian Reservation, thus making a total of 400 Northwestern Shoshone Indians on the Fort Hall Reservation. The commission further reported that a careful enumeration disclosed that there were 400 Northwestern Shoshone Indians in southern Idaho. In 1873 a number of Northwestern Shoshone Indians had gathered in northeastern Nevada and were assigned by the Indian Agent in Nevada to a small area in that section as a home. On May 10, 1877, this tract, by order of the President, was withdrawn from sale or settlement and set apart as a reservation for the Northwestern Shoshone Indians. However, in 1879, all the Indians thereon, numbering about 300, were removed to the Western Shoshone Indian Reservation known as the Duck Valley Indian Reservation in southwestern Idaho and northern Nevada.

25. Art. 3 of the treaty of July 30, 1863, with plaintiff bands stated:

> In consideration of the stipulations in the preceding articles, the United States agree to increase the annuity [$10,000] to the Shoshonee Nation five thousand dollars, to be paid in the manner provided in said treaty, * * *.

Following the final ratification of this treaty with plaintiff bands, there was appropriated by Congress for the "Northwestern Bands of Shoshones" annually for twenty years the sum of $5,000, as stipulated in the treaty of July 30, 1863, with plaintiffs. The total so appropriated for the

years 1865 to 1884, inclusive, for plaintiff bands was $100,000. The sums so appropriated, together with the sums appropriated for the Western bands and the Shoshonee-Goship bands of the Shoshone Tribe, were carried on the books of the Treasury under the heading "Fulfilling treaty with Shoshones." In the Indian Office, however, the sums appropriated for the "Northwestern Bands of Shoshones" for the first 18 instalments were carried on subsidiary ledgers under the heading "Fulfilling treaty with Shoshones, Northwestern Bands." Of the sum of $90,000 appropriated for the first 18 instalments and credited to this fund on the ledgers of the Indian Office, a total of $77,195.83 was expended for annuity goods for plaintiff bands leaving a deficiency of $12,804.17. However, the amount of $2,000 of this deficiency was subsequently recovered from Agent How and credited to the fund "Fulfilling treaty with Shoshones," which was a fund applicable to the fulfillment of the treaty stipulations with plaintiff bands and other bands of the Shoshones.

The last two treaty appropriations for the fiscal years 1883 and 1884 of $5,000 each for plaintiff bands, $5,000 each for the Western bands, and $1,000 each for the Goship bands, totaling $22,000, were carried under the control appropriation "Fulfilling treaty with Shoshones." No attempt was made by the Government's accounting officers to apportion the expenditures out of this fund among these bands, which appears to have been due to the fact that by this time the identity of the Shoshone Indians which had been known as the "Northwestern Bands" upon the Western Shoshone Reservation and other reservations, as hereinbefore mentioned, had been practically lost. This fund of $22,000 was supplemented by various amounts aggregating $3,861.78, in which amount was included the sum of $67.50, being an unexpended balance from the fund "Fulfilling treaty with Shoshones, Northwestern Bands," and the $2,000 recovered from Indian Agent How from advances made to him, making a total of $25,861.78 available under the appropriations and in the accounts of the Government for disbursement pursuant to the treaties with the Northwestern, Western, and Goship-Shoshone bands of the Shoshone Tribe of Indians. A total of $25,728.67 was disbursed out of this fund

for treaty goods at the Western Shoshone Agency in Nevada under the appropriation "Fulfilling treaty with Shoshones" without distinction or segregation of the accounting records as to the amounts of money disbursed for goods for each group of the Northwestern, Western, or Shoshone-Goship Indians. The treaty goods and provisions purchased with the money appropriated for each group of bands were disbursed to the Indians of the bands entitled thereto. The full amount of annuity appropriations for these bands of Shoshones was exhausted in 1894.

The deficiency in the disbursement of annuity appropriations for treaty goods and provisions due plaintiff bands from the total of $100,000 appropriated by Congress for this purpose is $10,804.17.

The court decided that plaintiff bands of the Shoshone Indians were not entitled to recover under the treaty of July 30, 1863, as for a taking by the United States of any portion of the land for which compensation was claimed.

The court further decided that plaintiff bands were entitled under Article 3 of the Treaty of July 30, 1863, to recover $10,804.17, subject to deduction of offsets, if any, under the terms of section 3 of the Jurisdictional Act, which offsets, if any, are reserved for determination as provided in Rule 39a of the Court of Claims.

LITTLETON, *Judge*, delivered the opinion of the court:

Section 1 of the Jurisdictional Act (45 Stat. 1407) provides as follows:

> That jurisdiction be, and hereby is, conferred upon the Court of Claims, notwithstanding lapse of time or statutes of limitations, to hear, adjudicate, and render judgment in any and all claims which the northwestern bands of Shoshone Indians may have against the United States arising under or growing out of the treaty of July 2, 1863 (18 Stat. 685, 2 Kappler 848); treaty of July 30, 1863 (13 Stat. 663, 2 Kappler 850); Act of Congress approved December 15, 1874 (18 Stat. 291), and any subsequent treaty Act of Congress, or Executive order, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States.

The treaty of July 2, 1863, mentioned above, was with the Eastern bands of the Shoshone Nation, and is set forth in finding 9. The treaty of July 30, 1863, was with plaintiff bands of the Shoshone Nation, and is set forth in finding 10. The act of Congress approved December 15, 1874 (18 Stat. 291, 292), was an act ratifying an agreement of September 26, 1872, with the Eastern bands of the Shoshone Indians ceding to the United States a portion of a reservation in the Wind River Valley of Wyoming set apart for the exclusive use and occupancy of said Eastern bands by the treaty with them of July 3, 1868. The plaintiff bands were not parties to the treaty of 1868 or the agreement of 1872. See 85 C. Cls. 331. The act of December 15, 1874, had no reference to the treaty of July 30, 1863, with plaintiff bands and did not affect that treaty, or any of the territory claimed in this proceeding. There were no treaties or acts of Congress subsequent to the treaty with plaintiff bands of July 30, 1863, other than the act of February 23, 1865, 13 Stat. 432, set forth in finding 22, which made reference to any part of the territory in which was located any of the land for which plaintiff bands herein make claim for compensation.

In order to recover in this case, plaintiff bands must show that in the treaty with them of July 30, 1863, or in the treaty of July 2, 1863, with the Eastern Bands of the Shoshone Nation, which was made a part of the treaty with plaintiff bands, the United States, acting through the appropriate officials of the Department of Indian Affairs, the treaty commissioners, who negotiated and made the treaty with these bands, the President, and the Senate expressly or by necessary implication recognized, acknowledged, and conceded under the terms of these treaties the exclusive possessory use and occupancy right or title of plaintiff bands of the Shoshone Indians as against the United States in the whole or some part of the territory of 15,643,000 acres of land for which they now make claim for compensation as for a taking in violation of that treaty of July 30, 1863.

The question whether under the Mexican laws at the time of the Mexican Cession of 1848 plaintiff bands had use

and occupancy rights—that is, "Indian title"—to certain of the land involved in this case based upon aboriginal possession or occupancy to the exclusion of other Indian tribes has been decided adversely to the defendant's contention in this case in *United States of America, as Guardian of the Indians of the Tribe of Hualpai in the State of Arizona* v. *Santa Fe Pacific Railroad Co.*, 314 U. S. 339, decided December 8, 1941. That was a suit by the United States, as guardian of the Hualpai (Walapais) Indians, for an accounting by the Railroad Company for all rents, issues and profits derived from the leasing, renting, or use of the lands subject to right of occupancy by the Indians, and the court said:

> Basic to the present causes of action is the theory that the lands in question were the ancestral home of the Walapais, that such occupancy constituted "Indian title" within the meaning of section 2 of the 1866 Act, which the United States agreed to extinguish, and that in absence of such extinguishment the grant to the railroad "conveyed the fee subject to this right of occupancy." *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55, 66. * * *
>
> Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact. If it were established as a fact that the lands in question were, or were included in, the ancestral home of the Walapais in the sense that they constituted definable territory occupied exclusively by the Walapais (as distinguished from lands wandered over by many tribes), then the Walapais had "Indian title" which unless extinguished survived the railroad grant of 1866. *Buttz* v. *Northern Pacific Railroad*, *supra*.
>
> "Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States." *Cramer* v. *United States*, 261 U. S. 219, 227. * * * Whatever may have been the rights of the Walapais under Spanish law, the *Cramer* case assumed that lands within the Mexican Cession were not excepted from the policy to respect Indian right of occupancy. * * *

Plaintiff bands contend that in their treaty of 1863 the United States recognized, acknowledged, and conceded their

aboriginal use and occupancy right or title to the territory within and without the Mexican Cession and that no action of the United States has ever extinguished this occupancy right or title.

The defendant contends that there was no such acknowledgement in this treaty by the United States of the exclusive use and occupancy title of plaintiff bands to any portion of the lands claimed by them as against the Government, but that the treaty was intended to be, and was, a treaty of peace and amity with stipulations for annuities in goods and provisions for the Indians, parties to the treaties, in return for such peace and amity by the ending of attacks upon settlers and depredations committed in the territory inhabited and roamed over by them, and upon the white emigrants passing through such country on the overland trails to California, Oregon, and the mining regions of Idaho and Montana.

We are of opinion from a careful consideration of the treaties of July 2 and July 30, 1863, in the light of the facts and circumstances disclosed by the record and the history of the times before and after the treaties with plaintiff bands and other bands of the Shoshone nation or tribe of Indians, that the defendant's contentions are correct and that the United States did not in the treaty with plaintiff bands recognize or acknowledge the use and occupancy right or title in plaintiff bands as against the Government to the whole or any portion of the territory now claimed by them. On the contrary, the record compels the conclusion that the United States has ever exercised dominion and complete ownership over the territory for which plaintiff bands now make claim. No subsequent treaty or agreement was ever made with plaintiff bands.

At the outset it should be stated that the fact that plaintiff bands may have inhabited, claimed, possessed, and occupied the whole or a part of the territory of 15,643,000 acres of land now claimed by them to the exclusion of other tribes of Indians, and with the recognition of the other tribes, would not entitle plaintiff bands here successfully to maintain the claim involved in this suit or authorize the court to enter judgment thereon based on immemorial or aborigi-

nal possession and occupancy. *Hayt, Administrator,* v. *United States,* 38 C. Cls. 455, 462; *Duwamish et al. Tribes of Indians* v. *United States,* 79 C. Cls. 530, 599, 600. Cf. *Coos Bay Indian Tribes et al.* v. *United States,* 87 C. Cls. 143; *The Wichita and Affiliated Bands of Indians in Oklahoma et al.* v. *United States,* 89 C. Cls. 378, 420. The jurisdictional act does not embrace such a claim independent of the treaty of July 30, 1863; therefore, unless the defendant by this treaty recognized and acknowledged that the plaintiff bands had exclusive possessory use and occupancy title, they are not entitled to recover as for a taking by the United States. The fact that the treaties of July 2 with the Eastern bands and of July 30 with plaintiff bands did not contain any express provision or language with reference to the matter of extinguishment of any claim, right, title, or interest of the Indians in respect of the territory inhabited by them does not establish that, by the treaty, the United States recognized and acknowledged the existence of such right or title as against its own title. Without doubt the United States had the unquestioned right to exercise complete dominion and ownership of the territory in which plaintiff bands were found in and prior to 1863. In *United States of America, as Guardian, etc.,* v. *Santa Fe Pacific Railroad Co., supra,* the court in referring to rights and title of Indian tribes based on aboriginal possession, use, and occupancy said—

> Nor is it true, as respondent [Railroad] urges, that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal government action. As stated in the *Cramer* case, "The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive." 261 U. S. at 229.

In speaking with reference to the matter of extinguishment of Indian title, the court further said:

> Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method, and time of such extinguishment raise political, not justiciable issues. *Buttz* v. *Northern Pacific Railroad, supra,* p. 66. As stated by Chief Justice Marshall

in *Johnson* v. *M'Intosh*, *supra*, p. 586, "the exclusive right of the United States to extinguish" Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts. *Beecher* v. *Wetherby*, 95 U. S. 517, 525.

In and prior to 1850 the Government had practically no knowledge with reference to the Indians inhabiting the country which became southern Idaho, eastern Oregon, northern Nevada, and northern Utah or of any particular areas occupied by any particular tribes or bands, and knew very little as to tribal distinctions. From 1849 until 1863, when the five treaties mentioned in the findings were made with the different bands of Indians of the Shoshone nation or tribe, and subsequently, the Government Indian agents and superintendents of Indian Affairs in Washington and Utah territories, in which the States of Idaho, Nevada, Utah, and Wyoming now are located, acquired in their travels and contacts with the Indians some information as to the locations of various bands of these Indians and the area in which they lived and over which they roamed and hunted, but such information was general in character and indefinite as to boundaries of specific areas and, also, as to specific bands or individual Indians of specific tribes. The Utah Superintendency of the Indian Department was located at Salt Lake and the agents and representatives of the Government at this superintendency made various trips among the Indians in that territory and westward, across what is now Nevada, in the vicinity of white settlements and along the overland trails to California, Oregon, and Idaho. The overland trail to California passed through the territory then occupied by the Eastern bands of Shoshones in what is now the southwestern portion of Wyoming and the northeast corner of Utah, through the territory occupied by plaintiff bands in what is now northeast Utah and southeast Idaho, through the territory occupied by the bands of Bannocks and Shoshones in northeast Idaho, the Goship-Shoshone bands in western Utah below Salt Lake, and the Western bands of the Shoshones in northeast Nevada. The

main California trail came through southwest Wyoming over the mountains into northeast Utah north of Great Salt Lake and across that portion of Utah to Nevada and south, in Nevada, to the Humboldt River and along that river westward across that state to California.

The Shoshone Tribe of Indians and the various bands thereof, with a few exceptions hereinafter mentioned, desired to be and were peaceful and friendly to the whites and the Government. The Shoshone nation, or tribe, as such, has never made war upon the United States or the white settlers. The bands of Shoshone Indians inhabiting the territory which became northern and western Utah, southern Idaho and northeastern Nevada were poor; the territory in which they lived was mostly desert country, and there was only a sparse supply of game and food. The white emigrants and settlers during the period from 1849 to 1863 practically destroyed the source of livelihood of the Shoshone Band of Indians in this territory. The result of this was that a number of Indians of the Northwestern Bands, and perhaps some of the other bands, made attacks upon the white settlers and emigrants and committed depredations from time to time up to January 1863. The record shows that the Indian agents and some of the military representatives of the Government traveling through a portion of the territory in which these Indians were found gave the various Indians, as far as they were able so to do, some provisions and supplies as presents for the purpose of endeavoring to end these attacks and depredations. The agents found that all the Indians desired peace but they were strong in their protestations of the destruction of their means of livelihood and begged the Government agents to bring them presents and provisions. The agents found and from time to time reported to the Commissioner of Indian Affairs, and the Commissioner of Indian Affairs reported to Congress in his annual reports that these Indians were practically in a starving condition by reason of destruction of their source of food and that they were desirous of peace; that the attacks and depredations were doubtless being committed because of their condition and because they deemed it necessary to "steal or starve." The record also shows

that the acts and conduct of certain unscrupulous whites also contributed to depredations by some of the Indians.

The Secretary of Interior and the Commissioner of Indian Affairs constantly recommended to Congress that some provision be made for assistance to and care of these Indians and that an appropriation be made and authority granted to negotiate treaties with them with a view to bringing about a permanent peace. It was not, however, until the enactment of a provision in the Appropriation Act of July 5, 1862, 12 Stat. 512, 529, that Congress made any appropriation for the assistance of these Indians or authorized the negotiation of a treaty with them. In that act Congress appropriated $20,000 "for defraying the expenses of negotiating a treaty with the Shoshonees or Snake Indians, * * *, to be expended under the direction of the Secretary of the Interior." The Secretary of the Interior had asked for $45,000, but Congress evidently thought that $20,000 would be sufficient to secure a treaty of peace. (See finding 4.)

Treaty commissioners were duly appointed and given instructions as set forth in finding 5. There was delay on the part of the commissioners in communicating to the Indians the intention of the Government to negotiate with them for peace and for payment of annuities, with the result that the attacks and depredations continued. Early in January 1863 the military authorities in the District of Utah learned of the encampment on Bear River, in the southeast corner of Idaho, of a large body of Indians from the Northwestern Bands and attacked this group of Indians in force and killed 224 of them. Thereafter, on or before June 1, 1863, the treaty commissioners, the chairman of which group was James Duane Doty, then superintendent of Indian Affairs for the Territory of Utah, began their work of negotiating with the Indians. The commissioners concluded that it would be best to meet and negotiate with the various bands of the Shoshone tribe in groups at different points for the reason that "The Shoshone bands are scattered over so vast an extent of country that it will be necessary for the commissioners to meet them at several points. The whole nation can never be assembled without

bringing them hundreds of miles." Most of the bands of this tribe, other than the Eastern bands, were without horses or other means of transportation. After the making of these treaties and the furnishing of annuities in goods and provisions, the Indians remained peaceful and did not cause the United States or the white settlers any serious trouble.

The territory ceded to the United States by Mexico February 2, 1848, under the treaty of Guadalupe Hidalgo, 9 Stat. 922, 929, added to the United States the area of what is now California, Nevada, Utah, Arizona, New Mexico, and a part of Colorado. Of the total of 15,643,000 acres of land claimed by plaintiff bands in this proceeding, 9,576,000 acres are located in Utah and Nevada within the Mexican Cession; the balance, or 6,067,000 acres, is located in southeast Idaho. Of the 25,197,000 acres described by the Eastern Bands of Shoshone Indians in the treaty with them of July 2, 1863, 7,552,000 acres are located in what is now northwest Colorado and northeast Utah, within the Mexican Cession, and the balance of 17,644,000 acres is located in what is now Wyoming and Idaho. All of the territory inhabited and described by the Goship-Shoshone Bands of Indians in the treaty with them of October 12, 1863, was located within the Mexican Cession, as was all the territory inhabited and described by the Western Bands of Shoshones in their treaty of October 1, 1863. (18 Stat. 689.) All the territory which the treaty commissioners indicated as being inhabited by the Mixed Bands of Bannocks and Shoshones was entirely within what is now northeast Idaho and western Wyoming, no part of which is in the territory of the Mexican Cession.

In the Act of September 30, 1850 (9 Stat. 544, 558), Congress made an appropriation of $20,000 "to enable the President to hold treaties with the various Indian tribes in the State of California." (Cf. Act of June 5, 1850, 9 Stat. 437, and page 555, paragraph 12, of the Act of September 30, 1850, *supra.*)

Eighteen separate treaties were negotiated between March 19, 1851, and January 7, 1852, with some of the tribes and bands of Indians in California. These treaties with the Indians of California were submitted to the Senate by the

President on June 1, 1852, for action, and on July 8, 1852, the Senate by unanimous vote adopted a resolution on each treaty refusing to give its consent thereto. This action of the Senate was due to the fact that at that time it did not desire to recognize in the Indians any possessory use or occupancy right, title or interest as against the United States to any specific lands for the reason that the United States in acquiring the territory from Mexico succeeded to all rights in the soil, possessory and otherwise, and the Government regarded itself as the absolute and unqualified owner; that since the Indians had no possessory, occupancy, or other rights therein which were to be in any manner respected, the United States was under no obligation to treat with the Indians occupying the same for the extinguishment of their title. The Executive Department and the Senate had that policy or attitude in mind in 1863 and 1864 when the treaty with plaintiff bands of the Shoshone Indians was negotiated, made, and ratified with the amendments hereinafter mentioned.

The treaty of July 30, 1863, with plaintiff bands and the treaty of July 2, 1863, with the Eastern Bands of the Shoshone Nation (findings 9 and 10) were ratified with the following amendment added by the Senate:

> Nothing herein contained shall be construed or taken to admit any other or greater title or interest in the lands embraced within the territories described in said treaty in said tribes or bands of Indians than existed in them upon the acquisition of said territories from Mexico by the laws thereof.

All the remaining treaties with the various bands of the Shoshone Tribe of Indians were ratified with like amendment March 7, 1864 (13 Stat. 663); however, action on the treaty with the Western Band of Shoshone Indians was reconsidered by the Senate on the same day and final action thereon was taken on June 26, 1866, more than two years later, when the same was ratified without amendment, other than the filling in of the blank space therein as to the amount of the annuity of $5,000 per annum for twenty years. Why the amendment above quoted, which was added to the other treaties, was first added to the Western Shoshone treaty

but finally left out when the treaty was subsequently ratified does not appear; but we think that has no important bearing upon the question of rights of plaintiff bands under their treaty. A subsequent change of attitude or policy toward these Indians would not, without more, constitute a recognition or acknowledgment of title by a prior treaty which did not disclose such an acknowledgment. In view of the position thus taken by the United States, we think it cannot be said that the treaty with plaintiff bands recognized and acknowledged any right, title, or interest in them to the territory which they may have occupied or to which they now make claim. Although the plaintiff bands, insofar as other tribes were concerned, may have exclusively occupied and used all or a portion of the territory involved in their present claim as their aboriginal home (and the record is sufficient to show that they did), they are not entitled to recover for the reason that the jurisdictional act only authorizes this court to consider, adjudicate, and render judgment on a claim "arising under or growing out of the treaty" with them. Such a claim must be one that is within the terms of and supported by the provisions of the treaty. Aboriginal occupancy and use is not such a claim. The record shows and we have found as a fact that the United States has never recognized, either at the time the treaty of July 30 was made, or subsequently, a right of exclusive occupancy in plaintiff bands to the territory claimed by them but that it has ever exercised complete dominion over the territory, and this is one method, or manner, so far as the present authority of the court to adjudicate is concerned, of extinguishing Indian title. *United States* v. *Santa Fe Pacific R. R. Co., supra.*

Moreover, in addition to what has hereinabove been said, the facts disclosed by the official records and communications of the Government show that it was not the intention of the Executive Department of the Government at the time of making the treaties with the Shoshone Indians in 1863 to stipulate and agree in such treaties either in favor of or against any use or occupancy claim of the Indians. The treaties were intended to be, and we think they are, treaties of peace and amity because the Government had very little

reliable information as to the territory actually occupied by these Indians. The treaty commissioners were therefore given specific instructions, among others, not to undertake negotiations with the view to extinguishment of any Indian title to land. We think the effect of these instructions, together with others which followed (finding 6), was that the treaty commissioners were not to stipulate with reference to the recognition and acknowledgment on the part of the Government of any exclusive use and occupancy title of the Indians to the land. Judging by what was done, we think the treaty commissioners so understood their instructions. The commissioners therefore simply wrote into the various treaties the statements made by different groups or bands as to the "country described" or "claimed" by them, which descriptions by the Indians were very general and rather indefinite. Especially was this true in connection with the treaty of July 30 with plaintiff bands. In this treaty Chief Pocatello, of one of the bands, mentioned only the Raft River and the Porteneuf Mountains in describing the territory "claimed for himself and his people," and nothing was said with reference to the northern or southern boundaries and nothing whatever with reference to an additional territory of 6,255,000 acres of land now claimed by plaintiff bands lying wholly west of Raft River. Art. 4 of the treaty with plaintiff bands therefore simply stated: "The country claimed by Pokatello, for himself and his people, is bounded on the west by Raft River and on the east by the Porteneuf Mountains." The purpose of obtaining a description of territory from the Indians was, as the letter of instructions of July 22, 1862, stated, to obtain as much information as possible as to what territory the Indians *claimed*, because the Government had no information in that regard from the Indians themselves, and very indefinite information otherwise as to the territory which they occupied.

We do not think the amendment added by the Senate constituted a recognition and acknowledgment of exclusive use and occupancy right or title by the Indians. That amendment did not have any relation to any territory not within the Mexican Cession. As to such territory

mentioned in the treaty as fell within the Mexican Cession, the amendment was simply a limitation on the right or title of the Indians based on aboriginal occupancy, if, as a matter of law, there was such a limitation under Mexican law in 1848. Without the amendment the treaty did not admit or deny aboriginal occupancy, nor did it acknowledge the right of exclusive use and occupancy as against the United States. The amendment therefore added nothing to the treaty in this respect.

In 1939 the General Land Office prepared a map based on more accurate information which followed the general outlines roughly indicated by Commissioner Doty on the map (finding 14) which accompanied the treaties and this 1939 map also showed the boundaries to the extent mentioned in the various treaties. After indicating the exterior boundaries within the general outlines shown on the Doty map, the Government computed the acreage therein. The entire area embraced within the general exterior lines shown on the Doty map which accompanied the treaty, as corrected and computed on the 1939 map, comprised 80,825,000 acres of land. The entire population of the Shoshone tribe and affiliated Bannock bands of Indians in 1863 was between 9,000 and 10,000; the population of the Eastern bands was about 4,500; that of the Northwestern Bands, about 1,800; that of the Western bands, about 2,000; and that of the Goship-Shoshone Bands, about 1,000. The number of Bannocks, or the Mixed Bands of Bannocks and Shoshones not included in the above-mentioned population of the Eastern Bands, was about 400. No census was taken by the agents of the Government; these figures as to population are approximate.

Upon the whole record we are of opinion that plaintiff bands are not entitled to recover under the treaty of July 30, 1863, as for a taking by the United States of any land for the reason that the defendant did not, in the treaty, set aside any specific area for the exclusive use and occupancy by plaintiffs, and did not, by the treaty, recognize or acknowledge any exclusive use and occupancy right and title of the Indians to the whole or any portion of the acreage here claimed. In reaching this conclusion we have

not departed from the rules to be followed in the interpretation of treaties with the Indians, as set forth in *Jones* v. *Meehan*, 175 U. S. 1; *United States* v. *Winans*, 198 U. S. 371; *Choctaw Nation* v. *United States*, 119 U. S. 1, 21; *Choctaw Nation* v. *United States*, 179 U. S. 494, 531–534; *Carpenter et al.* v. *Shaw*, 280 U. S. 363, 365; *Blackfeet et al. Tribe* v. *United States*, 81 C. Cls. 101.

Plaintiff bands claim that the defendant failed to fulfill the promises which it made in the treaty with reference to the annuity of $5,000 per annum for twenty years, totaling $100,000. This entire amount was appropriated by Congress in twenty annual instalments and the record satisfactorily shows that the total of the amount so appropriated except $10,804.17 was expended and disbursed by the Government in goods and provisions for the Indians of the Northwestern Bands. How and why the deficiency of $10,804.17 in the annuity goods due the Indians of the Northwestern Bands came about does not appear and the Government records do not disclose what became of this sum. After the treaty of July 30 with plaintiff Indians, band affiliations became practically lost. Some of these Indians went to the Wind River Reservation with the Eastern Band of Shoshones, some to the Fort Hall Indian Reservation in Idaho, some to the Western Shoshone or Duck Valley Indian Reservation in southwestern Idaho and northern Nevada, and an indefinite number of individual Indians of the Northwestern Bands continued to roam and live in northern Utah and southern Idaho and worked at times for white settlers. Whether this balance of $10,804.17 was not expended and disbursed in annuity goods for the Northwest Shoshone Indians because they were so scattered or whether the appropriation lapsed and the fund reverted to the Treasury does not appear. Plaintiff bands have submitted no proof to show that the defendant took this money for its own use or took it from plaintiff bands and gave or expended it for Indians other than the Indians of the Northwestern Bands.

Plaintiff bands are entitled to recover this sum of $10,804.17 to the extent that it may exceed any allowable offsets to which the defendant may show itself entitled under section 3 of the Jurisdictional Act on further pro-

ceedings under Rule 39(a). But plaintiff bands are not entitled to recover interest on this deficiency in the treaty annuities from the years in which the last two of the twenty annuity instalments were due, for the reason that the record does not establish that this money was taken by the United States under such circumstances as would entitle the plaintiff bands to interest as a part of just compensation. *The Choctaw Nation* v. *United States*, 91 C. Cls. 320, 402, 403.

The claim of plaintiffs for compensation as for a taking by the defendant of lands is dismissed, and an interlocutory order under Rule 39(a) is hereby entered reserving the determination of the amount of recovery, if any, in respect of the amount of $10,804.17 after determination of the amount of offsets, if any, for further proceedings. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

ST. LOUIS REFRIGERATING & COLD STORAGE COMPANY v. THE UNITED STATES

[No. 43110. Decided March 2, 1942]

On the Proofs

Excise tax on electrical energy under the Revenue Act of 1932; "commercial" consumption.—Where the plaintiff operated a refrigerating system in the city of St. Louis, utilizing electrical energy in the operation of said system; and where plaintiff's business consisted of (1) the manufacture and sale of ice; (2) the manufacture, distribution, and sale of refrigeration through pipe lines, the refrigeration being used for cold-storage boxes of produce dealers, for drinking water, for the air of buildings, and other needed purposes, and (3) the refrigeration of plaintiff's warehouses located in various parts of St. Louis in which were stored many kinds of perishable commodities; it is *held* that the business of plaintiff is predominantly "commercial" in its nature within the meaning of section 616 (a) of the Revenue Act of 1932, levying a tax of 3 per centum of the amount paid for electrical energy for domestic or commercial consumption, and plaintiff is accordingly not entitled to recover.

Same.—The statute does not recognize a twilight zone between "commerce" and "industry."

Same; Treasury Regulations.—Treasury Regulations may not serve to change the provisions of a statute.

Same.—It would be illogical to hold that the Government would be bound by Treasury Regulations construed by the Commissioner of Internal Revenue as limiting the application of the taxing statute as expressed in the regulations and at the same time to disregard the Commissioner's interpretation of those limits.

The Reporter's statement of the case:

Mr. Walter W. Ahrens for the plaintiff. *Messrs. John J. Hickey* and *James K. Polk* were on the briefs.

Mr. James K. Polk for Consolidated Edison Company of New York, Inc., as *amicus curiae*. *Mr. Robert E. Coulson* was on the brief.

Mr. Hubert L. Will, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. The plaintiff, the St. Louis Refrigerating & Cold Storage Company, is a Missouri corporation with its office and principal place of business located in St. Louis. It was incorporated in 1899 under the laws of Missouri governing the formation of private corporations for manufacturing and business purposes. In its Articles of Incorporation, dated April 26, 1899, it is stated that the purposes for which the corporation was formed were:

> To acquire, establish, erect, construct, maintain, and operate refrigerating, cooling, and cold-storage works, warehouses, depots, plants, structures, pipes, devices and appliances, and to supply the public with refrigerating, cooling, ventilating and cold-storage facilities and appliances; to carry on and extend the business heretofore carried on by the St. Louis Automatic Refrigerating Company, but without responsibility or liability for any of its debts; to acquire, lay, construct, maintain and operate along, upon, and under the avenues, streets, bridges, alleys, lanes, roads, market houses, and other public places, and by private way, within the City of St. Louis, main-pipes and all necessary feeders and service pipes in connection therewith, and

> such other devices and structures as may be necessary for the distribution of materials or agents for refrigerating or cooling purposes to the residents of said City, and for the return thereof, as is now permitted and authorized by Ordinance Number 15800 of said City of St. Louis, approved August 26th, 1890, and as may hereafter be authorized or permitted by future ordinances of said City; to acquire, make, use, lease, and sell refrigerators and all machines, apparatus, devices, appliances, and materials useful for or in connection with freezing, cooling, and ventilating processes, together with the products or residuum of such manufacture, processes, or materials; to manufacture and sell ice, and to sell or lease rights to use patented processes, devices and apparatus for freezing, cooling, or ventilating purposes.

2. The plaintiff and its predecessor, the St. Louis Automatic Refrigerating Company, by ordinances of the City of St. Louis, were granted the right

> * * * to construct, maintain and operate refrigerating works within the City of St. Louis, together with the right-of-way along, upon and under the avenues, streets, bridges, alleys, lanes, roads, market houses and other public places, * * * for the purpose of placing, operating, and maintaining main-pipes and all necessary feeders and service pipes in connection therewith, and such other devices and structures as may be necessary for the distribution of liquid anhydrous ammonia or other compressed liquefied gas or gases for refrigerating purposes, and for the conveyance of the expanded ammonia or other gas or gases or fluids used in the process of refrigeration * * *

3. The plaintiff now is, and for many years, including the period from June 21, 1932, to August 31, 1933, inclusive, was engaged in (1) manufacturing ice for sale to its customers; (2) distributing a refrigerating agent in liquid form through pipe lines located under the streets of St. Louis, pursuant to its franchise, for the purpose of producing refrigeration on the premises of its customers, and removing the refrigerating agent from the customer's premises in vapor form to reliquefy it at plaintiff's plant for recirculation; and (3) distributing a refrigerating agent in liquid form through pipe lines on its premises for the purpose of producing refrigeration for the treatment and preservation in its public

warehouse of perishable products owned by patrons of such warehouse, and processing such products, and then removing the refrigerating agent in vapor form to reliquefy it for recirculation. The term "processing" is limited to mean such natural reactions, if any, as may result during cold storage.

4. The plaintiff operates a refrigeration system, operated by electrical energy, in which it uses a readily liquefiable fluid, i. e., anhydrous ammonia, so that the vapor can be readily condensed to a liquid with cooling water when it is compressed to a reasonable pressure, averaging about 150 pounds per square inch gauge, and when the pressure is reduced on the liquid again, say to 15 pounds gauge, it evaporates at a temperature of approximately 0° F. with the absorption of a large amount of heat. The vapor formed is drawn away from the refrigerator by the suction action of a compressor and is compressed to the condenser pressure, and is here again liquefied. The ammonia continuously passes through a cycle of operation as follows: (1) the vapor from the refrigerator is compressed and cooled until it liquefies, (2) the liquid is discharged into the refrigerator at a predetermined pressure and in evaporating absorbs heat, (3) the vapor is then returned to the compressor. The temperature at which the heat is absorbed is regulated by maintaining the required pressure in the refrigerator. At 15 pounds gauge the liquid boils at about 0° F.; if the pressure is reduced to 0 pounds gauge the liquid boils at −28° F.; and if the pressure is increased to 30 pounds gauge the liquid boils at 17° F. Thus any desired refrigerator temperature can be obtained in this manner. The anhydrous ammonia is used over and over again in the cycle, and only that quantity which escapes through leaks in the system must be replaced.

5. The plaintiff uses this anhydrous ammonia, thus compressed into a liquid:

(a) By circulating the liquid, at a predetermined pressure, through pipes and coils, placed around tanks containing water, and as the liquid evaporates into a vapor it extracts the heat from the water causing the water to become ice.

(b) By circulating the liquid at various predetermined

pressures, through pipes running under the public streets of St. Louis from plaintiff's plant to buildings located at considerable distances from such plant, in which buildings the refrigeration, thus produced by the liquid evaporating into a vapor, is used to extract the heat from cold storage boxes of produce dealers, from drinking water, from the air of buildings and theaters, etc.

(c) By circulating the liquid, at various predetermined pressures, through pipes and coils placed in specially constructed and insulated rooms in plaintiff's public refrigerated warehouses, which rooms contain perishable commodities, such as eggs, cheese, butter, meat, poultry, fish, apples, vegetables, beer, frozen fruits, frozen berries, potatoes, etc., and as the liquid evaporates into a vapor it extracts the heat from these commodities resulting in their preservation for food purposes.

6. Many of the customers now supplied with refrigeration through the plaintiff's pipe lines, described in finding 5 (b), previously used ice for their refrigeration requirements, other customers of plaintiff having been supplied with such pipe-line refrigeration since the organization of their business.

7. The ice manufactured as described in finding 5 (a) is sold as accumulated refrigeration.

8. Commodities are customarily placed in refrigerated warehouses for preservation (1) at points of origin or production of such commodities, or (2) at points of destination or consumption of such commodities, or (3) at any points located between such origin points and such destination points.

9. The electrical energy used by the plaintiff in its refrigerated warehouse operations was used by plaintiff at an intermediate stage of the passage of perishable products from the producers to the retailers who vend such products. After passing through this intermediate stage the perishable products reach the custody of the retailer who uses refrigeration service for the preservation of the perishable products in connection with his selling operations.

10. As to its refrigerated warehouse operations plaintiff's dealings are with wholesalers, retailers, etc., in carloads or

other large lots, and not with individual consumers or in lots of goods as small as are involved in transactions with individual consumers.

11. Plaintiff stores butter, eggs, poultry, fruits, pecans, apples, fish, cheese, vegetables, and in fact all perishable food products in its warehouse. Such butter, eggs, and poultry originate in Illinois, Kansas, Nebraska, Iowa, California, Oregon, and Washington, and, after storage in plaintiff's warehouse, are reshipped to points in Indiana, Pennsylvania, New York, and in fact the entire eastern seaboard. Such fruits, pecans, apples, and many other commodities originate in Arkansas, Tennessee, Alabama, Georgia, Louisiana, Washington, Oregon, Idaho, and other States, and, after storage in plaintiff's warehouse, are reshipped to points in all other States east of the Mississippi River.

12. Plaintiff solicits its storage business from practically every state by direct personal contacts, solicitation by mail, and through national advertising, two of its officers traveling extensively throughout the United States soliciting such business.

13. Plaintiff's refrigerated warehouse is in direct competition with all large refrigerated warehouses located on railroad tracks in the United States, the extent of such competition depending upon the particular commodity in question and the location of such other refrigerated warehouses, and plaintiff's rates for storage are fixed in competition with such competing warehouses.

14. No tax on electrical energy used in refrigerated warehouse operations was assessed against, or collected by the Collector of Internal Revenue from, (1) refrigerated warehouses located in the State of California, because under the laws of California such warehouses are deemed to be affected with a public interest and classified as public utilities, and as such are exempted by paragraph 40, Regulations 42, of the Bureau of Internal Revenue, relating to the electrical-energy tax and (2) refrigerated warehouses owned and operated by any state or municipality.

15. Railroads, as a general rule, grant transit privileges of shipments for the temporary stoppage, handling, storage, and processing of such perishable products at convenient

transit points en route between the points of origin and destination of shipments, and, in their filed and published tariffs designate St. Louis, Missouri, including plaintiff's warehouse in St. Louis, as one of the points entitled to such transit privileges.

16. Railroads also provide and furnish refrigeration for and during the transportation of such perishable products in that railroad systems provide specially equipped refrigerator cars therefor, precool the cars, keep the bunkers of the cars iced, and frequently stop the cars en route to replenish the supply of ice in the bunkers. Railroads also permit their refrigerated cars to stand while loaded with such perishable products, at transit points and destination, thus augmenting their cold storage services.

17. The electrical energy used by plaintiff in its operations described in finding 5 was furnished and sold to plaintiff by the Union Electric Light & Power Company of St. Louis, Missouri, through four meters, two of which were small meters for emergency lighting at the main plant and the subplant, and two of which were main line meters at the main plant and the subplant. Plaintiff's estimate shows that the yearly consumption of electrical energy by plaintiff can be allotted to its various operations as follows:

(a) Manufacture of ice 3,500,000 KWH
(b) Manufacture of refrigeration for distribution through pipe lines 3,800,000 KWH
(c) Manufacture of refrigeration for use in the refrigerated warehouse 3,400,000 KWH

18. Plaintiff's revenues from its operations were as follows:

	Fiscal year ended April 30, 1933	Fiscal year ended April 30, 1934
Ice Department	$89,900.25	$88,698.40
Pipe Line Department	126,998.99	125,362.51
Cold Storage Revenue	240,376.01	254,360.37
Total	457,275.25	468,421.28

Ice Department revenue covers the actual sales price of ice; Pipe Line Department revenue covers the actual sales of pipe line refrigeration; and Cold Storage Revenue includes

both handling and storage charges, approximately 20% to 25% of the total being handling charges.

19. Union Electric Light & Power Company demanded of plaintiff a tax equivalent to 3% of the amount plaintiff paid for electrical energy consumed by it during the period from June 21, 1932, to August 31, 1933, inclusive, which tax, totaling $2,504.59, plaintiff duly paid to Union Electric Light & Power Company as collecting agent for the Commissioner of Internal Revenue on the dates specified in paragraph 4 of the petition herein.

20. The Commissioner of Internal Revenue on July 27, 1932, in reply to a letter from Representative Carroll L. Beedy, requesting a ruling concerning the tax imposed by section 616 of the Revenue Act of 1932 on amounts paid for electrical energy by the New England Cold Storage Co., Inc., advised him in part as follows:

> It is held that electrical energy consumed by the New England Cold Storage Co., Inc., in operating compressors in the manufacture of refrigeration is used for industrial consumption and that amounts paid for such energy are therefore not subject to the tax imposed by the above section [Sec. 616] of the Revenue Act of 1932.

October 3, 1932, the Commissioner wrote the New York State Association of Refrigerated Warehouses, in reference to the electrical energy tax, in part as follows:

> You are advised that the question of the taxable status of electrical energy which is furnished to public cold storage warehouses has been reconsidered and the Bureau is now of the opinion that the consumption of electrical energy in operating compressors in the manufacture of refrigeration for storage purposes is commercial in its scope, since such energy is not used in manufacturing or processing articles of commerce, and, therefore, is subject to the tax imposed by the abovenamed section [Sec. 616].
>
> Electrical energy used in the manufacture of ice for sale is not subject to the tax if separately metered.

December 1, 1932, the Commissioner in a letter to the General Manager of St. Louis Refrigerating & Cold Storage

Co., in reference to the taxable status of electrical energy, held as follows:

> * * * that, after a careful consideration of the facts submitted, the Bureau has reached the conclusion that electrical energy furnished to cold storage warehouses for use in the manufacture of refrigeration for storage purposes is commercial in its scope and, therefore, *subject to the tax imposed* by section 616 of the Revenue Act of 1932.

March 22, 1933, Deputy Commissioner R. M. Estes wrote the Collector of Internal Revenue at St. Louis, in reference to a request from the St. Louis Refrigerating and Cold Storage Co. for a ruling in connection with the tax on electrical energy, in part as follows:

> With respect to the use of electrical energy for purposes of pipeline refrigeration carried on under the authority of a franchise granted by the City of St. Louis, you are advised that this activity does not bring the company [St. Louis Refrigerating and Cold Storage Co.] within the classification of a "public utility" within the meaning and intent of internal revenue laws and regulations.
>
> It is held, therefore, that electrical energy furnished for direct consumption by the above-named company, through a single meter, for use in the activities outlined above is for use in a business the predominant character of which is held to be commercial in its scope and, therefore, is subject to the tax imposed by section 616 of the Revenue Act of 1932.

The letters quoted in this finding are of record as Exhibits A to D, inclusive, attached to the stipulation in this case and are made a part hereof by reference.

21. On or about July 24, 1934, the plaintiff filed a claim for refund of the aforesaid taxes with the Collector of Internal Revenue at St. Louis, on the grounds that:

> 1. Such electrical energy was not furnished to taxpayer for domestic or commercial consumption.
>
> 2. Such electrical energy was furnished to taxpayer for industrial consumption, and is therefore exempt from tax.
>
> 3. Such electrical energy was furnished to taxpayer for uses other than domestic or commercial, and is therefore exempt from tax.

The claim for refund was rejected by letter of the Commissioner to plaintiff dated May 3, 1935, reading in part as follows:

> It has been held by this office that the activities carried on by your company are predominantly commercial in their scope within the meaning and intent of internal revenue laws and regulations. Your claim is therefore rejected in full.

This letter is of record as Exhibit E attached to the stipulation in this case and is made a part hereof by reference.

22. No repayment of tax paid by plaintiff to the Union Electric Light & Power Company, or any part thereof, has been made to plaintiff by said collecting agency, and plaintiff has not consented to the allowance of credit or refund to such agency.

23. None of the taxes so paid by the plaintiff was billed separately or otherwise passed on to its customers or patrons, but said taxes were wholly absorbed and paid by the plaintiff out of its own funds without any reimbursement therefor.

24. FACTS AS TO REGULATIONS, INTERPRETATION, AND ADMINISTRATION OF SECTION 616 OF THE REVENUE ACT OF 1932

1. By section 616 of the Revenue Act of 1932 approved June 6, 1932, and effective June 21, 1932 (47 Stat. 169, 266), Congress imposed a tax on the amount paid for electrical energy for domestic or commercial consumption. Pursuant to that act, Treasury Regulations 42, Article 40, were promulgated June 17, 1932, eleven days after approval of the act. They were drafted under pressure, and since it was necessary to draft regulations covering other features of the act at the same time, the draftsmen in the Bureau of Internal Revenue were required to work practically every night from June 6, the date the act was approved, to June 17, when the Regulations were promulgated.

The evidence shows that regulations are drafted in the Miscellaneous Tax Unit of the Bureau of Internal Revenue, subject to approval or revision by the Rules and Legislative Section of the General Counsel's Office, after which they are submitted to the General Counsel, then to the Commissioner of Internal Revenue for approval, and finally they must be

approved by the Secretary of the Treasury. Such procedure was followed in this case.

The act referred to was the first excise tax imposed by Congress on electrical energy, and therefore the Bureau of Internal Revenue had, prior thereto, no experience in administering this type of tax. The provisions of the Regulations were general in their nature. It was difficult to determine whether a particular use of electrical energy was taxable. In an effort to clarify the language used in the Regulations Treasury Decision 4342 was issued on July 26, 1932. Among other things it provided for the exemption from taxation of certain nonprofit institutions and held that electrical energy consumed in any commercial phase of an industrial or other business was taxable. Accordingly Regulations 42, Article 40, were revised October 22, 1932, to include the amendments contained in Treasury Decision 4342.

2. Although the Regulations were revised several times in an effort to clarify the scope of the tax, it was and still is necessary for the Bureau to administer the act involved on the basis of individual rulings governing specific uses of electricity, resulting in numerous published and unpublished rulings covering almost every taxable use of electricity. While Regulations 42, Article 40, construe as exempt from tax the noncommercial use of electrical energy by public utilities, telegraph, telephone and radio communication companies, railroads and other common carriers, educational institutions not operated for private profit, churches, and charitable institutions, they at the same time construe the statute as meaning that the electrical energy consumed by these organizations in any commercial phase of their activities is not tax-exempt. Electrical energy is held taxable when utilized in the sales and display rooms, office buildings, retail stores, etc., operated by these organizations, where the energy is supplied from a meter not connected with their trunk lines, these activities being a commercial phase of their business. Electrical energy used by cold storage warehouses is consumed in a commercial activity, except where the warehouses are part of a railroad system, etc., or where they are used to store raw materials. This ruling applies in all states except California, whose law

holds that cold storage warehouses are public utilities. The Bureau previously held that all cold storage warehouses were tax-exempt.

3. The Treasury Department holds that the published rulings of the Bureau of Internal Revenue do not have the force or effect of Treasury Decisions and do not commit the Department to any interpretation of the law which has not been formally approved and promulgated by the Secretary of the Treasury. Each ruling embodies the administrative application of the law and Treasury Decisions to the entire set of facts upon which a particular case rests. Unpublished rulings are not cited or relied upon by officers and employes of the Bureau as a precedent in the disposition of other cases.

The court decided that the plaintiff was not entitled to recover.

Jones, *Judge*, delivered the opinion of the court:

Plaintiff paid taxes on electrical energy under Section 616 of the Revenue Act of 1932,[1] and seeks to recover them on the

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[1] Sec. 616.

(a) There is hereby imposed a tax equivalent to 3 per centum of the amount paid on or after the fifteenth day after the date of the enactment of this Act, for electrical energy for domestic or commercial consumption furnished after such date and before July 1, 1934, to be paid by the person paying for such electrical energy and to be collected by the vendor.

(b) Each vendor receiving any payments specified in subsection (a) shall collect the amount of the tax imposed by such subsection from the person making such payments, and shall on or before the last day of each month make a return, under oath, for the preceding month, and pay the taxes so collected, to the collector of the district in which his principal place of business is located, or if he has no principal place of business in the United States, to the collector at Baltimore, Maryland. Such returns shall contain such information and be made in such manner as the Commissioner with the approval of the Secretary may by regulation prescribe. The Commissioner may extend the time for making returns and paying the taxes collected, under such rules and regulations as he shall prescribe with the approval of the Secretary, but no such extension shall be for more than 90 days. The provisions of sections 771 to 774, inclusive, shall, in lieu of the provisions of sections 619 to 629, inclusive, be applicable in respect of the tax imposed by this section.

(c) No tax shall be imposed under this section upon any payment received for electrical energy furnished to the United States or to any State or Territory, or political subdivision thereof, or the District of Columbia. The right to exemption under this subsection shall be evidenced in such manner as the Commissioner with the approval of the Secretary may by regulation prescribe (47 Stat. 169, 266).

ground that they were erroneously assessed and collected.

The facts as stipulated by the respective parties are adopted as the essential facts of this case, with some additional findings in respect to Treasury decisions and regulations.

The issue is whether plaintiff's use of electrical energy is commercial consumption as defined in the quoted provision of the Revenue Act.

Plaintiff asserts its business is industrial or in a field between industrial and commercial and therefore without the scope of the statute. Defendant insists that the business is predominantly commercial.

Plaintiff operated a refrigerating system in the City of St. Louis. It used a fluid known as anhydrous ammonia, which could be readily liquefied, under compression, with cooling water. When the pressure was released it vaporized thus absorbing heat. The process of liquefaction and evaporation of the ammonia was repeated, thus making a continuous cycle of operation with the same commodity. The refrigerating system was operated by electrical energy.

There were three phases to the business: (1) the manufacture and sale of ice; (2) the manufacture, distribution and sale of refrigeration through pipe lines, the refrigeration being used for cold storage boxes of produce dealers, for drinking water, for the air of buildings and other needed purposes; and (3) the refrigeration of plaintiff's warehouses located in various parts of the City of St. Louis in which were stored many kinds of perishable commodities.

Section 616 (a) of the Revenue Act of 1932 (47 Stat. 169, 266), is as follows:

> There is hereby imposed a tax equivalent to 3 per centum of the amount paid on or after the fifteenth day after the date of the enactment of this Act, for electrical energy for domestic or commercial consumption, furnished after such date and before July 1, 1934, to be paid by the person paying for such electrical energy and to be collected by the vendor.

When the framework of plaintiff's business, with all its ramifications, is laid alongside the terms of the statute, it appears to come rather clearly within the taxable provisions.

The wording of the statute is very simple. It levies a tax equivalent to 3 per centum of the amount paid for electrical energy for domestic or commercial consumption.

Through its system of refrigeration the plaintiff cools the specially constructed and insulated cooling rooms in its own public refrigerated warehouses, and cools similar rooms in those of its customers in the City of St. Louis. It also manufactures ice which is sold in the St. Louis area.

Vegetables, fruits, dairy products, fish and other perishable products from a number of different states are stored in the warehouses and after storage are reshipped to points in various states. Its dealings are with wholesalers and retailers dealing in carload lots and not with individual consumers. Plaintiff solicits storage business from practically every state by direct contact, by mail and through national advertising.

When the business is considered as a whole, its activities being necessarily woven together, we think it is predominantly commercial in its nature. No separate meter was maintained for the part that was industrial and there is no satisfactory showing as to the amount of electrical energy consumed in that phase of the business.

It is earnestly insisted by plaintiff that there is a zone between commerce and industry and that plaintiff's business in the main is within this twilight zone.

There is no such distinction written into the terms of the taxing provisions. The only exception named in the statutes is energy furnished the Government or political subdivisions thereof.

True, Treasury Regulations 42 recognize certain named activities as neither commercial nor industrial within the meaning of the act, but such regulations do not name the type of business actively involved in this case as falling between the two classifications. Besides, regulations may not serve to change the provisions of a statute.

Plaintiff insists that the intention of the Congress, as reflected in the history of the legislation, was to reach only individual consumers and the small business concerns and not users on a large scale.

The discussions in the Congress covered a wide range. Many individual statements were made. These are quoted *in extenso* by both parties with conflicting interpretations. However, the Conference Report, which was made by a Joint Conference Committee representing both the Senate and the House, and which was the last committee explanation before the final vote was taken, contained the following explanation of the taxing provision which is involved here:

> The House recedes with an amendment substituting a tax of 3 percent of the price paid for electrical energy for domestic or commercial use (*as distinguished from industrial use*), to be paid by the purchaser and collected by the vendor, with necessary administrative provisions and an exemption in the case of electrical energy sold to the United States, any State or Territory or political subdivision thereof, or the District of Columbia. [Italics supplied.]

If any ambiguity existed and any explanations were needed apart from the language of the statute, this final Joint Conference Committee Report makes it clear that it was the intention that the term "commercial" should have a meaning broader than the restricted sense which plaintiff would have us apply. It explains that the tax applies to commercial as distinguished from industrial use. It then exempts only electrical energy sold to the government, national or state, or a political subdivision thereof.

We may add that this seems the natural construction of the wording of the statute.

The use of the two terms by way of contrast followed by the reference to political subdivisions as the only named exemption would seem to preclude the intermediate classification which plaintiff attempts to read into the statute.

It hardly seems necessary to go behind the clear wording of the statute. Certainly it is unnecessary to go behind the Joint Conference Committee Report into the maze of discussion and interpretation by individual members of the Congress when the statute itself, which is the final product of their labors, is couched in simple language clearly expressed.

We think some of the confusion has arisen from the effort on the part of the administrative unit to establish an

intermediate field between commerce and industry. This makes the problem more difficult. Since there are no definite calls, the construction of two dividing lines instead of one is made necessary, and the extent of such field, if established, can be measured only by the somewhat varying use of otherwise well-known words.

In the general understanding commerce and industry cover the entire business field [1] and while it is sometimes difficult to know whether a border-line business falls mainly in the field of commerce or industry it is far less difficult than to attempt to establish shadowy lines. It is far less complicated to follow the generally accepted meaning of the terms which are used in the taxing statute.

This conclusion is further strengthened by the wording of the Act of June 16, 1933, in which Section 616 is reenacted with only one change pertaining to exemptions, namely, the exemption of publicly owned electric and power plants. (48 Stat. 254, 256.) The inclusion of this exemption indicates the exclusion of other similar exemptions. While the Act of 1933 has no application to the period involved in the instant case, the naming of the exemption supports the conclusion that the Congress had no thought of establishing the intermediate business field for which plaintiff contends.

Churches, charitable, educational, and other nonprofit institutions, as such, would not be subject to the tax, regardless of whether such field were established, since they fall wholly without the realm of business.

The Commissioner of Internal Revenue has a most difficult task in interpreting the numerous taxing statutes and the many statutory changes that are necessarily made from time to time by the Congress to fit the vast and rapidly changing business structure of the country. But we must construe the language of the act as we find it.

It is contended by plaintiff that Congress after the issuance of Treasury Regulations 42 repeatedly re-enacted the tax law without substantial change in this provision, thus confirming the Commissioner's action. The contention loses much of its force in the light of the numerous rulings, decisions, and exceptions that have been made necessary by the

[1] *Jordan* v. *Tashiro*, 278 U. S. 123, 127–128.

complicated and widely varying nature of the many businesses affected. But if this viewpoint is accepted the fact remains that the Commissioner of Internal Revenue, who prepared the regulations, also held that plaintiff's business did not fall within the nontaxable intermediate field. It would be rather illogical to hold that the Government would be bound by the Commissioner's construction limiting the application of the statute as expressed in the regulations, and at the same time disregard the Commissioner's interpretation of those limits.

Even if the term "commercial" were construed in the narrower sense for which plaintiff contends, it would not necessarily follow that it would be exempt from the tax. With the single exception of the manufacture of ice, plaintiff's activities are predominantly commercial. Its servicing is commercial. Its business is primarily commercial. It follows the product in the process of distribution. Its activities are an integral part of the current or stream of commerce. Thus, regardless of whether the Commissioner of Internal Revenue properly construed the act in undertaking by regulation to exempt certain businesses on the ground that they are neither industrial nor commercial, the plaintiff's business is subject to the tax.

It follows that plaintiff's petition must be dismissed and it is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

FULTON MARKET COLD STORAGE COMPANY v. THE UNITED STATES

[No. 43336. Decided March 2, 1942]

On the Proofs

Excise tax on electrical energy under the Revenue Act of 1932; "commercial" consumption.—Decided upon the authority of *St. Louis Refrigerating & Cold Storage Company* v. *The United States*, *ante*, page 694.

The Reporter's statement of the case:

Mr. Walter W. Ahrens for the plaintiff. *Messrs. John J. Hickey* and *James K. Polk* were on the briefs.

Mr. James K. Polk for Consolidated Edison Company of New York, Inc., as *amicus curiae*. *Mr. Robert E. Coulson* was on the brief.

Mr. Hubert L. Will, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson, Fred K. Dyar* and *George H. Foster* were on the brief.

The court made special findings of fact as follows, upon the evidence and a stipulation of the parties:

1. The plaintiff, the Fulton Market Cold Storage Company, is an Illinois corporation with its office and principal place of business located in Chicago.

2. The plaintiff now is, and for many years, including the period from June 21, 1932, to August 31, 1933, inclusive, was engaged in distributing a refrigerating agent in liquid form through pipe lines on its premises for the purpose of producing refrigeration for the treatment and preservation in its public warehouse of perishable products owned by patrons of such warehouse, and processing such products, and then removing the refrigerating agent in vapor form to reliquefy it for recirculation. The term "processing" is limited to mean such natural reactions, if any, as may result during cold storage.

3. The plaintiff operates an indirect refrigeration system, operated by electrical energy, in which it uses a readily liquefiable fluid, i. e., anhydrous ammonia, so that the vapor can be readily condensed to a liquid with cooling water when it is compressed to a reasonable pressure, averaging about 150 pounds per square inch gauge, and when the pressure is reduced on the liquid again, say to 15 pounds gauge, it evaporates at a temperature of approximately 0° F. with the absorption of a large amount of heat. The absorption of the heat is from a secondary system of calcium chloride brine which circulates through the refrigerator in coils or pipes. The ammonia vapor formed is drawn away from the refrigerator by the suction action of a compressor and is compressed to the condenser pressure, and is here again

liquefied. The ammonia continuously passes through a cycle of operation as follows: (1) the vapor from the refrigerator is compressed and cooled until it liquefies, (2) the liquid is discharged into the refrigerator at a predetermined pressure and in evaporating absorbs heat from the brine, (3) the vapor is then returned to the compressor. The temperature at which the heat is absorbed is regulated by maintaining the required pressure in the refrigerator. At 15 pounds gauge the liquid boils at about 0° F.; if the pressure is reduced to 0 pounds gauge, the liquid boils at −28° F.; and if the pressure is increased to 30 pounds gauge, the liquid boils at 17° F. Thus any desired refrigerator temperature can be obtained in this manner. The anhydrous ammonia is used over and over again in the cycle, and only that quantity which escapes through leaks in the system must be replaced.

4. The plaintiff uses the aforementioned calcium chlorine brine by circulating the brine at various predetermined temperatures through pipes and coils placed in specially constructed and insulated rooms in plaintiff's public refrigerated warehouse, which rooms contain perishable commodities, such as eggs, cheese, butter, meat, poultry, fish, apples, vegetables, beer, frozen fruits, frozen berries, potatoes, etc., and as the brine circulates, it extracts the heat from these commodities resulting in their preservation for food purposes. The brine returns to the refrigerator where the accumulated heat from the food is absorbed by the evaporating ammonia.

5. Commodities are customarily placed in refrigerated warehouses for preservation (1) at points of origin or production of such commodities, or (2) at points of destination or consumption of such commodities, or (3) at any points located between such origin points and such destination points.

6. The electrical energy used by the plaintiff in its refrigerated warehouse operations was used by plaintiff at an intermediate stage of the passage of perishable products from the producers to the retailers who vend such products. After passing through this intermediate stage the perishable products reach the custody of the retailer who uses refriger-

ation service for the preservation of the perishable products in connection with his selling operations.

7. As to its refrigerated warehouse operations plaintiff's dealings are with wholesalers, retailers, etc., in carloads or other large lots, and not with individual consumers or in lots of goods as small as are involved in transactions with individual consumers.

8. Plaintiff stores butter, eggs, poultry, fruits, pecans, apples, fish, cheese, vegetables, and in fact all perishable food products in its warehouse. Such butter, eggs, and poultry originate in Illinois, Kansas, Nebraska, Iowa, California, Oregon, and Washington, and, after storage in plaintiff's warehouse, are reshipped to points in Indiana, Pennsylvania, New York, and in fact the entire eastern seaboard. Such fruits, pecans, apples, and many other commodities originate in Arkansas, Tennessee, Alabama, Georgia, Louisiana, Washington, Oregon, Idaho, and other states, and, after storage in plaintiff's warehouse, are reshipped to points in all other states east of the Mississippi River.

9. Plaintiff solicits its storage business from practically every state by direct personal contacts, solicitation by mail, and through national advertising, two of its officers or solicitors traveling extensively throughout the United States soliciting such business.

10. Plaintiff's refrigerated warehouse is in direct competition with all large refrigerated warehouses located on railroad tracks in the United States, the extent of such competition depending upon the particular commodity in question and the location of such other refrigerated warehouses, and plaintiff's rates for storage are fixed in competition with such competing warehouses.

11. No tax on electrical energy used in refrigerated warehouse operations was assessed against, or collected by the Collector of Internal Revenue from, (1) refrigerated warehouses located in the State of California, because under the laws of California such warehouses are deemed to be affected with a public interest and classified as public utilities, and as such are exempted by paragraph 40, Regulations

42, of the Bureau of Internal Revenue, relating to the elec-
products reach the custody of the retailer who uses refriger-
trical energy tax, and (2) refrigerated warehouses owned and operated by any state or municipality.

12. Railroads, as a general rule, grant transit privileges on shipments for the temporary stoppage, handling, storage, and processing of such perishable products at convenient transit points en route between the points of origin and destination of shipments, and, in their filed and published tariffs, designate Chicago, including plaintiff's warehouse in that city as one of the points entitled to such transit privileges.

13. Railroads also provide and furnish refrigeration for and during the transportation of such perishable products, in that railroad systems provide specially equipped refrigerator cars therefor, precool the cars, keep the bunkers of the cars iced, and frequently stop the cars en route to replenish the supply of ice in the bunkers. Railroads also permit their refrigerated cars to stand while loaded with such perishable product, at transit points and destination, thus augmenting their cold storage services.

14. The electrical energy used by plaintiff in its operations described in finding 4 was furnished and sold to plaintiff by the Commonwealth Edison Company of Chicago, Illinois.

15. On or about April 5, 1935, the Collector of Internal Revenue for the First District of Illinois demanded of plaintiff a tax equivalent to 3% of the amount plaintiff paid for electrical energy consumed by it during the period from June 21, 1932, to August 31, 1933, inclusive, which tax, totaling $683.12, plaintiff duly paid, under protest, to said Collector of Internal Revenue for the First District of Illinois on or about April 13, 1935.

16. August 22, 1935, the plaintiff filed a claim for refund of the aforesaid taxes with the Collector of Internal Revenue for the First District of Illinois, at Chicago, on the grounds that:

> 1. Such electrical energy was not furnished to taxpayer for domestic or commercial consumption.
> 2. Such electrical energy was furnished to taxpayer for industrial consumption, and is therefore exempt from tax.

3. Such electrical energy was furnished to taxpayer for uses other than domestic or commercial, and is therefore exempt from tax.

The said claim was rejected by letter of the Commissioner to plaintiff, dated November 1, 1935, reading in part as follows:

> This office has consistently held that electrical energy consumed in operating compressors in the manufacturing of refrigeration for cold storage purposes is not used in manufacturing or processing of articles of commerce and that the business is commercial in scope and subject to tax. Your claim is therefore rejected in full.

This letter is of record as Exhibit A attached to the stipulation herein and is made a part hereof by reference.

17. No repayment of tax paid by plaintiff to the Collector of Internal Revenue for the First District of Illinois, or any part thereof, has been made to plaintiff.

18. No part of the tax so paid by the plaintiff was billed separately or was otherwise passed on to its customers or patrons, but said tax was wholly absorbed and paid by plaintiff out of its own funds without any reimbursement therefor.

19. FACTS AS TO REGULATIONS, INTERPRETATION, AND ADMINISTRATION OF SECTION 616 OF THE REVENUE ACT OF 1932

1. By section 616 of the Revenue Act of 1932, approved June 6, 1932, and effective June 21, 1932 (47 Stat. 169, 266), Congress imposed a tax on the amount paid for electrical energy for domestic or commercial consumption. Pursuant to that act, Treasury Regulations 42, Article 40, were promulgated June 17, 1932, eleven days after approval of the act. They were drafted under pressure, and since it was necessary to draft regulations covering other features of the act at the same time, the draftsmen in the Bureau of Internal Revenue were required to work practically every night from June 6, the date the act was approved, to June 17, when the Regulations were promulgated.

The evidence shows that regulations are drafted in the Miscellaneous Tax Unit of the Bureau of Internal Revenue,

subject to approval or revision by the Rules and Legislative Section of the General Counsel's Office, after which they are submitted to the General Counsel, then to the Commissioner of Internal Revenue for approval, and finally they must be approved by the Secretary of the Treasury. Such procedure was followed in this case.

The act referred to was the first excise tax imposed by Congress on electrical energy, and therefore the Bureau of Internal Revenue had, prior thereto, no experience in administering this type of tax. The provisions of the Regulations were general in their nature. It was difficult to determine whether a particular use of electrical energy was taxable. In an effort to clarify the language used in the Regulations Treasury Decision 4342 was issued on July 26, 1932. Among other things it provided for the exemption from taxation of certain nonprofit institutions and held that electrical energy consumed in any commercial phase of an industrial or other business was taxable. Accordingly Regulations 42, Article 40, were revised October 22, 1932, to include the amendments contained in Treasury Decision 4342.

2. Although the Regulations were revised several times in an effort to clarify the scope of the tax, it was and still is necessary for the Bureau to administer the act involved on the basis of individual rulings governing specific uses of electricity, resulting in numerous published and unpublished rulings covering almost every taxable use of electricity. While Regulations 42, Article 40, construe as exempt from tax the noncommercial use of electrical energy by public utilities, telegraph, telephone, and radio communication companies, railroads and other common carriers, educational institutions not operated for private profit, churches, and charitable institutions, they at the same time construe the statute as meaning that the electrical energy consumed by these organizations in any commercial phase of their activities is not tax-exempt. Electrical energy is held taxable when utilized in the sales and display rooms, office buildings, retail stores, etc., operated by these organizations, where the energy is supplied from a meter not connected with

their trunk lines, these activities being a commercial phase of their business. Electrical energy used by cold storage warehouses is consumed in a commercial activity, except where the warehouses are part of a railroad system, etc., or where they are used to store raw materials. This ruling applies in all states except California, whose law holds that cold storage warehouses are public utilities. The Bureau previously held that all cold storage warehouses were tax-exempt.

3. The Treasury Department holds that the published rulings of the Bureau of Internal Revenue do not have the force or effect of Treasury Decisions and do not commit the Department to any interpretation of the law which has not been formally approved and promulgated by the Secretary of the Treasury. Each ruling embodies the administrative application of the law and Treasury Decisions to the entire set of facts upon which a particular case rests. Unpublished rulings are not cited or relied upon by officers and employes of the Bureau as a precedent in the disposition of other cases.

The court decided that the plaintiff was not entitled to recover.

Opinion *per curiam:*

The material facts in this case are substantially the same as the facts in *St. Louis Refrigerating & Cold Storage Company*, No. 43110, decided this day. The question presented is the same.

Upon the facts disclosed and for the reasons set forth in *St. Louis Refrigerating & Cold Storage Company* v. *The United States*, *supra*, the court is of the opinion that the plaintiff is not entitled to recover, and the petition is therefore dismissed.

It is so ordered.

ARTHUR A. AGETON v. THE UNITED STATES

[No. 43970. Decided March 2, 1942]

On the Proofs

Pay and allowances; lieutenant in Navy with dependent mother; rental allowance while on sea duty.—Where plaintiff, a lieutenant in the United States Navy, with a dependent mother, while on sea duty was given no allowance as rental for quarters; it is *held* that plaintiff is entitled to recover the full rental allowance for an officer of his rank with dependents for the period involved.

Same; insufficient allowance.—Where plaintiff, a lieutenant in the United States Navy, with a dependent mother, was under the statute entitled to occupy four rooms in Government quarters; and where plaintiff was, however, given only one room for his own occupancy with no allowance; it is *held* that for the period of such occupancy plaintiff is entitled to recover for the three additional rooms to which he was otherwise entitled, all at the monetary value fixed by Presidential order.

Same; administrative interpretation.—The long-continued interpretation by administrative officials of an act, which in the meantime is reenacted by the Congress, is evidence of its proper construction.

The Reporter's statement of the case:

Mr. Fred W. Shields for plaintiff. *King & King* were on the briefs.

Mr. L. R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff, Arthur A. Ageton, was appointed a midshipman on August 25, 1919, was commissioned an ensign from June 8, 1923, lieutenant (junior grade) from June 8, 1926, and lieutenant from October 1, 1930, under which appointment he was serving on active duty at all times here involved.

2. Plaintiff's mother, Minnie D. Ageton, is more than 69 years of age. She resides permanently at 216 Second and Olive Streets, Long Beach, California. Her husband, Peter Benjamin Ageton, died on October 19, 1919, leaving her a house, valued at about $2,000, and $2,000 in insurance. Both

the house and the proceeds of his insurance were disposed of by Mrs. Ageton long prior to May 1, 1932, and on that date she owned no real or personal property aside from her small personal belongings.

3. Plaintiff's mother lived with him from September 1, 1930, to April 26, 1932. On that date she was seriously injured in an automobile accident in Washington, D. C., and was taken to Emergency Hospital, where she remained until May 10, 1932, when she was transferred to Columbia Women's Hospital, where she stayed until the latter part of November 1932. After her discharge from the last-named hospital she moved to New Orleans, Louisiana, where she resided alone at 421 Baronne Street until November 24, 1933, when this claim terminates.

4. While plaintiff's mother resided with him, he gave her about $20 a month which was credited to her account in the Pullman State Bank, Pullman, Washington, in addition to small amounts in cash from time to time. He also provided her with food, clothes, and shelter, the reasonable value of all of his contributions to her being about $60 per month.

In July 1932 plaintiff increased to $40 a month the sum which he credited to his mother's account each month in the Pullman State Bank. He continued to credit this sum to her account each month until the end of 1933.

5. During the period of this claim, plaintiff's mother had two children other than plaintiff—a son Richard (since deceased) who was a mining engineer, and a second son Frederick, who was employed intermittently as a deck officer in the Merchant Marine Service. Both sons were married. Richard assisted the mother to the extent of $200 in the payment of her medical and hospital expenses, and during the period from June 13, 1932, to July 25, 1932, caused to be deposited to his mother's credit in her account with the Pullman State Bank the sum of $240. While the mother was living in New Orleans he contributed $25 a month to her support. The son Frederick was unable to make any contributions to the support of his mother and had at one time borrowed $100 from her, which money he repaid during the period covered by this claim.

6. While plaintiff's mother was receiving treatment in the hospitals from April 25, 1932, to about December 15, 1932, she incurred hospital and medical expenses amounting to about $1,160.

Plaintiff assumed payment of $585 of these expenses; his brother Richard contributed $200 towards such expenses, and a cab company gave $375 to the mother in full settlement of its liability for her accident, which sum was applied toward the payment of her medical and hospital expenses. Plaintiff in addition bought her such gifts as a radio, an electric fan, hospital supplies, etc.

7. While his mother was living in New Orleans, plaintiff continued to contribute $40 each month to her. This sum and the $25 which his brother Richard contributed each month to her were her sole income.

She paid $35 a month for rent and used the remaining $30 to pay her other incidental living expenses. During this period she purchased no clothing whatever. The two principal items of her living expenses consisted of her rent and the cost of her food.

8. Plaintiff's mother had no income other than the contributions made to her by the plaintiff and her son Richard. She was not gainfully employed at any time and on account of her poor health and age was unable to hold or to seek employment.

9. Plaintiff was married on November 24, 1933.

10. From July 5, 1932, to September 16, 1932, plaintiff was assigned to duty at the Battle Force Gunnery School, San Diego, California, and was assigned to and occupied public quarters consisting of one room without bath in the bachelor officers' quarters at the Naval Air Station, Coronado, California; from September 16, 1932, to June 12, 1933, plaintiff was serving on sea duty on the U. S. S. *Pruitt*, and from June 15, 1933, to September 10, 1934, on board the U. S. S. *Salinas*. Plaintiff's mother did not occupy Government quarters during the period of this claim.

11. During those times when he was neither assigned to public quarters nor on sea duty, plaintiff was paid the rental allowance of an officer of his status without dependents. During the period May 1, 1932, to November 24, 1933,

plaintiff was paid the subsistence allowance of an officer without dependents.

12. The difference between the rental allowances of an officer of plaintiff's grade and length of service without dependents and those of an officer of his grade and length of service with dependents, for the period May 1, 1932, through November 23, 1933, is the sum of $1,207.33. One additional subsistence allowance for the period amounts to $299.95, making a total of $1,507.28, which has not been paid plaintiff.

The court decided that the plaintiff was entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

The plaintiff, who is a Lieutenant in the United States Navy, brings this suit to recover rental and subsistence allowances which he claims are due him from the Government for the period from May 1, 1932, to November 24, 1933.

The defendant now concedes that the evidence shows that the plaintiff had a dependent mother during the period covered by his claim, and there is no dispute as to the other material facts in the case. The controversy is as to the amount due the plaintiff.

Part of the period involved as shown by the findings the plaintiff was assigned and occupied a room in the bachelor quarters of the Government. This room was provided with bath and was located at the Naval Air Station at Coronado, California. Plaintiff's mother did not at any time during the period involved occupy Government quarters.

During the time that plaintiff was neither assigned to public quarters nor on sea duty, plaintiff was paid the rental allowance of an officer of his status without dependents. During the period of May 1, 1932, to December 24, 1933, plaintiff was paid the subsistence allowance of an officer of his status without dependents. Plaintiff claims to be entitled to the full allowance for the period involved and seeks to recover the balance due him accordingly.

Plaintiff bases his claim to full rental allowance under provisions of section 2 of the Act of May 31, 1924, 43 Stat. 250, amending section 6 of the Act of June 10, 1922. This

statute has been reenacted in the United States Code but no change has been made in the wording thereof although the sections have been renumbered so that section 6 has now become section 10.

The determination of the case depends upon the construction given to that portion of the Act which reads as follows:

> SEC. 2. That section 6 of said Act be, and the same is hereby, amended to read as follows:
>
> SEC. 6. Except as otherwise provided in the fourth paragraph of this section, each commissioned officer below the grade of brigadier general or its equivalent, in any of the services mentioned in the title of this Act, while either on active duty or entitled to active-duty pay shall be entitled at all times to a money allowance for rental of quarters. * * *
>
> No rental allowance shall accrue to an officer, having no dependents, while he is on field or sea duty, nor while an officer with or without dependents is assigned as quarters at his permanent station the number of rooms provided by law for an officer of his rank or a less number of rooms in any particular case wherein, in the judgment of competent superior authority of the service concerned, a less number of rooms would be adequate for the occupancy of the officer and his dependents.

The last paragraph quoted above is the fourth paragraph of section 6.

This court has in many decisions with reference to allowances made to Naval officers announced principles which are inconsistent with the construction of the statute contended for by plaintiff, and which would deny him a full allowance under the circumstances shown in the findings.

The court is now, however, informed for the first time that the Comptroller General's Office has uniformly and continuously held, ever since the amendment of the statute in 1924, that an officer with dependents on sea duty who is not given any quarters for his dependents is entitled to the full rental allowance, evidently because a berth in a cabin on shipboard was not regarded as quarters. This ruling passed directly on the allowance of an officer having dependents when on sea duty. The nature of the case is such that it

must have arisen on very numerous occasions since, and a large number of officers paid accordingly. The rule is so well established that the long continued practice of administrative officials who were called upon to administer the Act (especially when in the meantime, it has been reenacted) is evidence of its proper construction and acquiescence by the legislative body therein, that we need to make no citation of authorities.

While this rule is not in accord with principles laid down by this court in prior decisions with reference to allowances to Naval officers, this court has never passed upon the precise point here involved nor even considered the effect of the amendments made by the Act of 1924.

We are therefore of the opinion that the administrative practice must prevail and plaintiff given the full allowance during the period he was on sea duty.

The determination of what plaintiff's allowance should be during the period when he occupied Government quarters presents a very different question. The plaintiff claims he is entitled to the full allowance for this period also. It is obvious that such a ruling would give him five rooms, one of which he occupied, and four for which he would be paid; but such a holding would be in direct conflict with the provisions of the statute which fixed the number of rooms to which he was entitled at four and we must construe the statute as a whole. The portion of the statute upon which plaintiff relies we think is ambiguous and not clear in its meaning when considered in connection with the other provisions.

Under such circumstances, a reasonable construction should be given to the statute and we do not think it could have been intended by Congress that an officer should be given a room which he occupies, and at the same time be paid for it, especially when such a holding would conflict with other provisions of the statute.

We therefore conclude that this part of the case should be decided in conformity with our opinions previously rendered and that the plaintiff should be charged with the room he occupied in Government quarters for the period of such occupancy and reimbursed for the three rooms to which he

was otherwise entitled, all at the monetary value fixed by presidential order. While the rule applied may not work out with perfect equity in all cases, we think that it is the fairest that can be made.

Entry of judgment will be deferred until the incoming of a report from the General Accounting Office showing the balance due plaintiff computed in accordance with the findings and this opinion. When this is determined, judgment will be rendered in plaintiff's favor accordingly.

WHALEY, *Chief Justice*, concurs.

JONES, *Judge*, concurring:

I concur in the result on the ground that, while the plaintiff is entitled to a statutory allowance equivalent to the fixed value of four rooms, the value of the one room actually assigned and used should be treated as a partial allotment or part payment of the statutory obligation. While divided living quarters may not be equivalent to complete undivided quarters, the awarding of the full allowance for four rooms without any deduction for the one room actually assigned and used would amount to more than the statutory allowance.

MADDEN, *Judge*, dissenting in part:

I do not agree with that part of the decision and opinion of the court which disallows plaintiff's claim for the period during which he occupied bachelor quarters.

The applicable statute is Section 6 of the Act of June 10, 1922, as amended by Section 2 of the Act of May 31, 1924. (43 Stat. 250, 37 U. S. C. A., sec. 10.) The first paragraph of that section is as follows:

> Except as otherwise provided in the fourth paragraph of this section, each commissioned officer below the grade of brigadier general or its equivalent, in any of the services mentioned in the first paragraph of section 1 of this title, while either on active duty or entitled to active duty pay shall be entitled at all times to a money allowance for rental of quarters. The amount of such money allowance for the rental of quarters shall be determined by the rate for one room to be fixed by the President for each fiscal year in accordance with a certificate fur-

> nished by the Secretary of Labor showing the costs of rents for the calendar year 1922. Such rate for one room is hereby fixed at $20 per month for the fiscal year 1923, and this rate shall be the maximum and shall be used by the President as the standard in fixing the same or lower rates for subsequent years.

The second and third paragraphs specify the number of rooms, or corresponding allowance, to which officers of different ranks are entitled. The fourth paragraph is as follows:

> No rental allowance shall accrue to an officer, having no dependents, while he is on field or sea duty, nor while an officer with or without dependents is assigned as quarters at his permanent station the number of rooms provided by law for an officer of his rank or a less number of rooms in any particular case wherein, in the judgment of competent superior authority of the service concerned, a less number of rooms would be adequate for the occupancy of the officer and his dependents.

The fifth paragraph of the section authorizes the President to make regulations in execution of the provisions of the section.

In reporting the bill which contained the section enacted and referred to above, the Committee on Military Affairs of the House of Representatives said of the section:[1]

> The second section of the bill is a redraft of section 6 of the pay readjustment act relating to money allowance for rental of quarters in order to make clear the import and uniform the application of the same. The textual arrangement and scheme of the section as a whole has been much improved by including and combining all the exclusionary provisions affecting rental allowance in a single paragraph. This paragraph is preceded by three paragraphs containing the express grant of rental allowance, certain and unconditional in nature except as conditioned by aforesaid exclusionary provisions of the fourth paragraph, as conclusively appears from the initial clause of the redrafted section, reading "Except as otherwise provided in the fourth paragraph of this section." The effect of this is to simplify the meaning and administration of this section by securing to all officers drawing pay-period

[1] House Report No. 236, 68th Cong., 1st Sess.

pay the corresponding rental allowance which the section creates and which ceases to accrue only in the circumstances specified in the fourth paragraph thereof.

That the language of the existing section, as reflecting the legislative intent in this matter, has proved unsatisfactory and should not longer be allowed to stand is the conclusion of your committee from a consideration of various decisions of the Comptroller General thereon. (2 Comp. Gen. 47, July 25, 1922; 2 Comp. Gen. 107, August 11, 1922; 2 Comp. Gen. 160, August 30, 1922; 2 Comp. Gen. 399, December 26, 1922; 2 Comp. Gen. 430, January 10, 1923; 2 Comp. Gen. 437, January 16, 1923; 2 Comp. Gen. 745, May 10, 1923; reconsideration decision, May 22, 1923, to Secretary of War; Royce case, June 30, 1923.)

The decisions of the Comptroller General cited in the report showed that it had been necessary for the departments to submit many questions to the Comptroller General concerning the 1922 act.

The language of the amended statute and the congressional intent as shown by the committee report show that the purpose of the Congress was to "simplify the meaning and administration" of the rental allowance statute, by expressly granting to each officer an allowance "certain and unconditional in nature except as conditioned by aforesaid exclusionary provisions of the fourth paragraph," and "which ceases to accrue only in the circumstances specified in the fourth paragraph * * *."

The fourth paragraph of the section, quoted above, has no application to plaintiff's situation. He was not an officer "having no dependents." He was not an officer "assigned as quarters at his permanent station the number of rooms provided by law for an officer of his rank * * *." He was entitled to four rooms and was assigned one. No "competent superior authority" had decided nor does the defendant now contend that the one room assigned him was "adequate for the occupancy of the officer and his dependents."

Plaintiff's case, then, seems to be within the provisions of the statute granting a four-room rental allowance, and not within the exclusionary provisions. The court nevertheless has held that for a part of the period in question, plaintiff should not receive the full statutory allowance, but one-

fourth less, or an allowance for three rooms, because during that part of the period plaintiff had a room in public quarters. The basis for the court's holding apparently is that the rental allowance is a reimbursement for expenses incurred, and since plaintiff has been saved the expense of one room by having a room in public quarters, his allowance should be reduced accordingly.

I disagree for two reasons. First, it seems to me to be directly in the teeth of the statute, the meaning of which is further pointed with unusual clarity by the Committee report. Second, as a doctrine of offsets invented by the court to put equity in the statute, it is not supportable because it is unfair.

The statute, particularly in view of the accompanying committee report, seems to me to be clear in its purpose. It provides for money allowances for rental of quarters, fixes the number of rooms to which officers of the several ranks shall be entitled, and sets the money value of each room. Then in the fourth paragraph of Section 6 it provides that no rental allowance should accrue to officers in certain circumstances. One of those is that he be an officer *without* dependents while on sea duty. Plaintiff was an officer *with* dependents while on sea duty. He did not come within the exclusionary language, and the court so holds and gives him his allowance for his time on board ship. The other situation in which an officer is excluded from the statutory allowance is that he be "an officer with or without dependents * * * assigned as quarters at his permanent station the number of rooms provided by law for an officer of his rank or a less number of rooms in any particular case wherein, in the judgment of competent superior authority of the service concerned, a less number of rooms would be adequate for the occupancy of the officer and his dependents." Again plaintiff does not come within the exclusionary language, as both parties readily concede. Yet the court holds that plaintiff, on this count, does not get the money allowance provided in the earlier paragraphs of the section, but a part of it. Here the court, I think, is entitled to credit for invention. There is not a syllable in the statute, which was intended by its draftsmen "to make clear the import and uniform the applica-

tion" of the act relating to money allowances for rental of quarters, which could be regarded as an anticipation of this result. The committee report shows that plaintiff's statutory allowance was to "cease to accrue only in the circumstances specified in the fourth paragraph * * *." Plaintiff was, admittedly not "in the circumstances specified in the fourth paragraph", yet a substantial part of his allowance "ceases to accrue" nevertheless.

No reason is given in the opinion of the court for giving plaintiff his full allowance while on board ship but deducting a part of it while on shore except that as to the former situation the Comptroller General in numerous rulings has so held. The Comptroller General seems not to have ruled as to the latter situation. The opinion of the court concedes that there is no logical difference between the two situations. That being obviously true, the Comptroller General may be expected to rule, when the occasion arises, that one situated as plaintiff is shall have his full allowance. The court in this case rules to the contrary. Yet the Committee's purpose in amending the act was "to make clear the import and *uniform* the application of the same." [Italics supplied.]

As to the equity of the defendant's position, there is no evidence that an officer with dependents entitled to four rooms can maintain his dependents at one place in three rooms at the standard at which he and they are expected to live, at three-fourths the rent of a four-room apartment. Experience is to the contrary. If in fact he rents quarters for his dependents with the remaining three-fourths of his rental allowance, his family will live in inadequate quarters in one place, while he does the same in another. He and they will, therefore, be penalized, either financially if he provides them with adequate quarters, or in their standard of living if he provides them with what he can get for the remaining portion of the allowance, because he is unfortunate enough to be an officer stationed at a post where official living quarters for officers' families are not available.

Judge Littleton authorizes me to say that he concurs in this opinion.

SCHROEDER BESSE OYSTER COMPANY, INC., GUSTAV J. SCHROEDER, ERNEST A. BESSE, FRANK W. SHERMAN v. THE UNITED STATES

[No. 43988. Decided March 2, 1942]

On the Proofs

Damages for destruction of oysters and oyster beds by dredging operations; Rivers and Harbors Act of 1935.—Where it is established by uncontradicted evidence that plaintiffs, oyster growers in Onset Bay, Mass., suffered damages as a result of dredging operations conducted by the Government in the improvement of the Cape Cod Canal; it is *held* that plaintiffs are entitled to recover under the provisions of section 13 of the Rivers and Harbors Act of 1935, 49 Stat. 1028.

Same; Government's liability admitted.—Under the terms of the Rivers and Harbors Act of 1935 the Government not only gave plaintiffs the right to sue for damages but admitted its liability for all damages resulting to oyster growers "from dredging operations and use of other machinery and equipment" for making such improvements.

Same; not necessary to prove negligence.—Under the terms of said act it is not necessary to prove negligence. *Radel Oyster Company* v. *United States*, 78 C. Cls. 816 cited. *Mansfield* v. *United States, et al.*, 94 C. Cls. 397–440, distinguished.

Same; speculative damages.—Speculative damages are not allowable under the said act.

The Reporter's statement of the case:

Mr. Ira L. Ewers for the plaintiffs. *Messrs. John F. Rich* and *Thomas H. Bilodeau* and *Burns and Brandon* were on the briefs.

Mr. Elihu Schott, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. This suit was instituted under Section 13 of the act of August 30, 1935, 49 Stat. 1028, 1049, which reads:

> SEC. 13. That the Court of Claims shall have jurisdiction to hear and determine claims for damages to oyster growers upon private or leased lands or bottoms arising from dredging operations and use of other ma-

chinery and equipment in making such improvements: *Provided*, That suits shall be instituted within one year after such operations shall have terminated.

The petition herein was filed June 11, 1938.

2. Schroeder Besse Oyster Company, Inc., one of the plaintiffs herein, is a domestic corporation of the Commonwealth of Massachusetts, and for many years has been successfully engaged in the business of growing oysters and seed oysters and distributing and selling oysters, seed oysters, fish, lobsters, and shellfish. The other plaintiffs, Gustav J. Schroeder, Ernest A. Besse, and Frank W. Sherman, are citizens of the United States and stockholders of Schroeder Besse Oyster Co., Inc.

The individuals, Gustav J. Schroeder, Ernest A. Besse, and Frank W. Sherman, during the times herein involved, held licenses from the Board of Selectmen, Town of Wareham, County of Plymouth, Commonwealth of Massachusetts, by long-established custom renewable to the licensee or his local successor in interest for 10-year periods, to plant, grow, and dig oysters, below mean low-water mark, in certain lots in Onset Bay, near the Cape Cod Canal, which they held to the use and benefit of Schroeder Besse Oyster Co., Inc., its successors and assigns, numbered as follows: 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 30, 34, 36, 43, 45.

Permanent destruction as oyster beds by adjacent Government dredging is claimed of the following lots, the several areas of which are shown in acres:

Lot number:	*Acres*
17	2.1
18	2.2
19	3.2
20	3.5
21	7.8
26	4.6
27	3.9
Total	27.3

The location of the various lots with reference to each other and surrounding territory, including Cape Cod Canal and its channel into Buzzards Bay, is indicated on a map

which is in evidence as plaintiffs' Exhibit No. 28 and made part hereof by reference.

3. Under the act of August 30, 1935, 49 Stat. 1028, 1029, the War Department in 1935 undertook the improvement of Cape Cod Canal set forth in the act and Rivers and Harbors Committee Document No. 15, 74th Congress, 1st Session, and continued work thereon in the years 1936, 1937, and 1938. In this improvement there were the following dredging operations:

Job No. 37–28.—Dredging operations were conducted by the Dredge *Crest*, a dipper-type dredge, and the Dredge *Bay State No. 10*, a clam-shell type of dredge. These dredges worked on the section of the canal approach extending from Station 428 to Station 520. Station numbers and other data are indicated on the map which is a part of joint Exhibit No. 1 and made part hereof by reference.

The *Bay State No. 10* dredged from September 4, 1935, to January 3, 1936, and by the latter date had removed a total of 240,825.7 cubic yards of sand, gravel, mud, silt, and boulders. The *Bay State No. 10* was assisted in these operations by three tugboats, six dump scows, one launch, and one quarterboat. The *Crest* began dredging on August 24, 1935, and by May 25, 1936, when work on this job ceased, had removed 1,858,148.3 cubic yards of sand, gravel, clay, mud, hardpan, and rock. The *Crest* was assisted in these operations by two tugboats, three dump scows, and one launch. The total material removed on this job was 2,098,974 cubic yards.

Job 37–29.—Dredging operations were conducted by the Dredge *Delver*, a clam-shell type of dredge, and the Dredge *Toledo III*, a dipper type of dredge. The *Delver* dredged from September 27, 1935, to November 13, 1935, between Station 529 and Station 553 of the canal and in this period removed a total of 159,128 cubic yards of sand and mud. The *Delver* commenced dredging at Station 550 on September 27, 1935, and ended at Station 529 on November 13, 1935. The Dredge *Delver* was assisted in these operations by two tugboats, two dump scows, two launches, and one water boat.

The *Toledo III* dredged from August 19, 1935, to July 1, 1936, between Station 530 and Station 670 of the canal and in this period removed a total of 1,687,909.9 cubic yards of sand,

clay, mud, hardpan, and boulders. The *Toledo III* began dredging at Station 670 on August 19, 1935, and ended at Station 532 on July 1, 1936. The *Toledo III* was assisted in these operations by four tugboats, three dump scows, and three launches.

Job 37–38.—Dredging operations were concluded by the Dredge *Pittsburg*, an hydraulic pipe-line dredge, which was assisted by two tugboats, five barges, and two launches. The *Pittsburg* worked on the section of the canal extending from Station 490 to Station 670. This dredge commenced dredging on June 22, 1936, at Station 630 and completed the westerly third of the job on August 31, 1936, dredging during this period between Stations 605 and 670 and Stations 503 and 505. On September 1, 1936, it moved to the easterly end of the job and worked westerly, dredging between Station 490 and Station 627. The *Pittsburg* completed the work on this job on February 8, 1937, at Station 522. By that date it had removed 4,426,751 cubic yards of sand, gravel, clay, mud, and other material.

Job 37–40.—Dredging operations were commenced on July 1, 1936, at Station 460 of the canal by the Dredge *Crest*, which dredged northeasterly to Station 445. From July 17 to August 12, 1936, the *Crest* worked on Onset Channel from Station 0 to Station 48, dredging a channel 100 feet in width. The *Crest* then began to dredge at Station 445 and worked easterly until September 17, 1937, when work on this job was discontinued at Station 425 to permit the *Crest* to dredge elsewhere. The *Crest* was assisted in these operations by seven tugboats, three dump scows, and two launches. The Dredge *Bay State No. 4*, a clam-shell type of dredge, dredged from September 14, 1936, to October 28, 1936, on the Hog Island Channel of the canal, working between Station 455 and Station 468. The *Bay State No. 4* was assisted by four tugboats, two dump scows, one launch, one water boat, and one quarterboat. In the periods noted above in this paragraph these two dredges removed a total of 2,727,300 cubic yards of sand, gravel, clay, mud, hardpan, and rock. The Dredge *Governor Warfield*, a dipper type of dredge, dredged from Station 4 to Station 11 of Onset Channel on August 11, 12, and 13, 1938.

Job 37–49.—Dredging operations were conducted by the Dredge *Pittsburg*, which was assisted by two tugboats, two derrick barges, and four barges. The *Pittsburg* dredged from May 17, 1937, to July 20, 1937, between Station 429 and Station 472. From May 17, 1937, to June 1, 1937, this dredge worked in the West Mooring Basin, on the south side of the canal, commencing to dredge at Station 440 and ending at Station 458. This dredge was then moved to the north side of the main canal, where it worked until June 18, 1937, commencing at Station 446 and ending at Station 472. On June 18, 1937, the *Pittsburg* resumed dredging operations in the West Mooring Basin and completed the work on this job in that part of the canal on July 20, 1937, at Station 457. The West Mooring Basin is indicated on the map in joint Exhibit No. 1 by the bulge on the south side of the canal between Station 430 and Station 470. The *Pittsburg*, during the period noted in this paragraph, removed on this job a total of 1,472,878 cubic yards of sand, gravel, mud, stone, and silt.

Job 37–50.—Dredging operations were conducted by the Dredge *Crest*, which was assisted by three tugboats, two dump scows, and two launches. This dredge removed shoals in the West Mooring Basin, in the vicinity of Station 463, from September 17, 1937, to October 13, 1937. On the latter date the *Crest* was moved to Station 542, on the northerly side of the Hog Island Channel of the canal, where work was begun, advancing in a northeasterly direction. The work on this job was completed at Station 417 on February 7, 1938. During this period this dredge worked between Station 413 and Station 542 and removed a total of 649,177 cubic yards of sand, gravel, mud, clay, hardpan, and rock.

From May 1936 to April 28, 1937, the Dredge *Minquas*, a seagoing hopper type of dredge, did maintenance dredging at various points in the old ship channel, covering the area between Station 400 and Station 590. In this period this dredge removed 286,255 cubic yards of miscellaneous material, which was dumped in Buzzards Bay near Abiel's Ledge, about three miles from the entrance to Onset Bay.

The materials removed on Jobs 37–28, 37–29, 37–40, and

37–50 were carried by dump scows to a point in Buzzards Bay about ten miles from the entrance to Onset Bay. The materials removed on job 37–38 were deposited southwesterly of Stony Point to form the Stony Point Dike. The materials removed on job 37–49 were used to construct the Hog Island and Mashnee Island Dikes.

The U. S. seagoing Dredge *Minquas* was engaged in maintenance work on the canal during the period July 29, 1935, to June 16, 1936, inclusive, 202 scattered days between Stations 370 and 540. The *Minquas* was a small suction hopper dredge.

All these dredging operations were conducted without advance notice to the plaintiffs.

4. The dredging operations described in Finding 3 caused mud and silt to be deposited on plaintiffs' oyster beds, known as lots or grants 17, 18, 19, 20, 21, 26, and 27, a total of 27.3 acres, not theretofore present, in such quantity as permanently to destroy their use for the propagation or growing of oysters, and the licenses for their use in the planting, growing, and digging of oysters thereby became valueless and were formally abandoned by the plaintiffs September 27, 1939. The use granted by the licenses had a fair and reasonable value to the holder thereof or to the one by agreement entitled to its benefits, of $70 per acre, bare of oysters, at or about the time the oyster beds were destroyed as such by the dredging operations, a total for the 27.3 acres of $1,911.00.

5. Mud and silt drifting in from the dredging operations destroyed mature oysters that had been planted by the plaintiffs in their oyster beds.

On lots 19, 20, 21, 22, 23, 26, and 27 there would have normally matured, ready for harvest, had there not been deposited mud and silt, 3,962 bushels, more or less. Plaintiffs harvested on these lots 2,123 bushels, of which about 1,486 bushels were alive and marketable, the remainder dead. Due to the muddy condition of the beds and the high proportion of dead oysters brought to the surface, further salvaging had to be abandoned. This left 2,476 bushels of dead or necessarily abandoned oysters. The fair market

value of live oysters in these lots, at time and place of the harvest, was $1.96 per bushel, a loss on 2,476 bushels of $4,852.96.

On lots 17 and 18 there would have normally matured, ready for harvest, had there not been deposited mud and silt, 3,150 bushels, more or less. Plaintiffs harvested on these lots 1,037 bushels, of which about 518 bushels were alive and marketable. Due to the muddy condition of the beds and the high proportion of dead oysters brought to the surface, further salvaging had to be abandoned. This left 2,632 bushels of dead or necessarily abandoned oysters. The fair market value of live oysters in these lots, at time and place of harvest, was $2.33 per bushel, a loss on 2,632 bushels of $6,132.56.

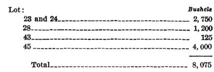
6. On some of plaintiffs' lots were "seed-catching bars." These bars were peculiarly adapted to the propagation of oysters in the course of which the fertilized spawn or spat settles in the water and becomes attached to a clean object where it matures. These objects are known as cultch and shells were used as such by the plaintiffs, which is common usage.

Plaintiffs' seed-catching bars were located, two on lot 45, one on lot 43, two on lot 28, one on lots 23 and 24, and one on lot 21, in the years 1935, 1936, and 1937. They had been carefully prepared and the ground surface kept at about mean low tide so that they would be in and out of water with the tides. This made for a larger set as the spats had time to become adhered more closely to the shell when the shell was exposed to the air.

During 1936 and 1937 plaintiffs lost sets on these bars due to the muddying of the waters by drifting in from the Government's above-described dredging operations. In 1936, plaintiffs planted shells for catching sets on lots and in amounts as follows:

Lot:	*Bushels*
21	1,000
23 and 24	3,000
28	1,500
45	3,600
Total	9,100

In 1937 plaintiffs planted shells for catching sets on lots and in amounts as follows:



Lot:	*Bushels*
23 and 24	2,750
28	1,200
43	125
45	4,000
Total	8,075

The combined planting for these two years was 17,175 bushels. The fair market value of shells with sets on them, in 1936 and 1937, ready for market, was 50 cents per bushel in and around Onset Bay, with allowance for handling and shrinkage. The reasonable value of the shells in the beds without seeds on them was 10 cents per bushel which on 17,175 bushels amounts to $1,717.50.

7. In conducting their operations plaintiffs used proper care in keeping their damages to a minimum.

8. In September of 1936 Schroeder Besse Oyster Co., Inc., advised the district engineer, U. S. Engineer Office, War Department, Boston, Mass., of damage being suffered by their business and property through the Government's dredging operations, and on September 23, 1937, submitted to the district engineer a claim for damages in the sum of $17,540.00, exclusive of value of grounds, stating:

> In all cases we are placing our claims at the lowest figure possible. We are not placing any claims for damages to our grounds. This damage consists of about twenty acres or more made unusable by coverage with silt and mud, caused by flowage from the dredging operations. We expect that we will be able to reclaim these grounds, both by natural action of tides carrying the debris off, and by scouring the bottom with our oyster dredges. This, of course, will possibly take a year or two after operations around the western end of the Canal have ceased. In the meantime we will not have the use of these grounds which are very necessary to our business.

On May 3, 1938, the district engineer informed the oyster company that the War Department did not have jurisdiction of the claim, and referred the company to Section 13 of the act of August 30, 1935, whereupon this suit was instituted.

The court decided that the plaintiff was entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

The plaintiffs are oyster growers in and near Onset Bay in the town of Wareham in the State of Massachusetts, and held licenses to plant, grow, and dig oysters in certain lots. The individual plaintiffs held their licenses for the use and benefit of the Schroeder Besse Oyster Company, Inc. They claim no separate interest.

Under the River and Harbor Act of 1935, act of August 30, 1935, 49 Stat. 1028, 1029, the Government undertook the improvement of Cape Cod Canal as set out in the act, and Rivers and Harbors Committee Document No. 15, 74th Congress, 1st Session, and commenced dredging operations on that project in the year 1936 and continued throughout the years 1937 and 1938. In conducting these operations the defendant used several types of dredges. At times the hydraulic pipe-line dredge, the dipper dredge, the seagoing hopper dredge, and the clamshell dredge were used. Some of these dredges were used at the same time and others from time to time. There was no continuous operation in any definite line or section of the canal. The dredges were moved from place to place and from one direction to another, and were operated from time to time. The operation of these dredges on this project caused much silt to be deposited on plaintiff's oyster grounds and seed-catching bars which resulted in damage to plaintiff's oyster grounds, oysters, and seed-catching operations.

The oyster grounds involved in this case were lots of land for the most part lying in the shallow waters of Onset Bay, Massachusetts, and licensed to plaintiff by the town of Wareham, by the authority of the Commonwealth of Massachusetts.

There was no advance notice given to plaintiff of the dredging on the Cape Cod Canal other than the general notice to the public in the passage of the River and Harbor Act of 1935. No written notice was served on it.

In the River and Harbor Act of 1935, *supra*, providing for this project there is inserted section 13, which reads as follows:

That the Court of Claims shall have jurisdiction to hear and determine claims for damages to oyster growers upon private or leased lands or bottoms arising from dredging operations and use of other machinery and equipment in making such improvements: *Provided*, That suits shall be instituted within one year after such operations shall have terminated.

Under the terms of this act the Government has not only given plaintiff the right to sue for damages but it admits its liability for all damages resulting to oyster growers from "dredging operations and use of other machinery and equipment" for making such improvements.

It is not necessary under the terms of this act to prove negligence in the operation of any instrumentality of the Government but simply to show by the preponderance of the evidence that the plaintiff was an oyster grower who was damaged as a result of dredging operations and the use of machinery and equipment in making the improvements.

This case is in line with the decision of this court in *Radel Oyster Company* v. *United States*, 78 C. Cls. 816, in which the Government admitted liability for the tort.

In the instant case no negligence has to be proved but only that damages have been sustained by the use of these instrumentalities of the Government and by the dredging operations.

The instant case is different from the *Mansfield case*, 94 C. Cls. 397, which was under a special jurisdictional act and required that negligence be proved.

In the trial of this case the defendant has introduced no witnesses. One of the defendant's engineers testified as a witness for the plaintiff. No other engineer engaged in the operation testified for either party and no attempt has been made by the defendant to contradict the evidence of plaintiff as to the amount of loss sustained.

The commissioner has found in a careful examination of the evidence and the court has adopted and confirmed his finding that, due to the dredging operations, certain lots (Finding 4) totaling 27.3 acres were permanently destroyed for the propagation and growing of oysters and the licenses for their use in planting, growing, and digging

oysters have become valueless. The total damage to the plaintiff for this acreage is $1,911.00. Plaintiff is entitled to recover on this item.

On certain other lots, set out in Finding 5, mud and silt deposits caused by defendant's dredging operations destroyed certain mature oysters which had been planted by the plaintiff on its oyster beds. The loss sustained by plaintiff due to the destruction of these mature oysters totals $4,852.96. Plaintiff is entitled to recover on this item.

In addition to the lots above mentioned, there were two lots, No. 17 and No. 18, on which oysters had been planted and upon which mud and silt were deposited by defendant's operations. Plaintiff attempted to salvage these beds but, owing to the muddy condition of the beds and the heavy proportion of dead oysters which were brought to the surface, it was determined that further salvage operations were futile. Plaintiff lost on these two beds a total of 2,632 bushels of oysters which had a reasonable market value of $6,132.56. Plaintiff is entitled to recover on this item.

Plaintiff planted 9,100 bushels of shells on five lots for the purpose of catching sets of young oysters. The object and aim of plaintiff in setting out these shells was for the purpose of having spawn attach themselves to the shells and become young seed oysters and in this way reclaim certain beds. This method was in conformity with the custom of oyster growers in the general conduct of their business of growing oysters. These operations were in the nature of tests and experiments and were fully justified under the circumstances. However, due to the mud and silt stirred up by the dredges and carried a long distance by the current, the spawn were destroyed with the result that there were no adhesions to the shells and there was a total loss. In 1937 plaintiff repeated these operations and this time planted 8,075 bushels of shells with the same purpose and object in view. Claim is made that, had plaintiff been successful in obtaining the usual number of young sets on these shells, their value would have been $.50 a bushel.

There is no question that the plaintiff was justified in attempting to conduct its business in the usual manner for

propagating oysters for the coming season by depositing shells on the seed-catching bars and is entitled to whatever damage it sustained by reason of the outlay to which it was put. In other words, plaintiff is entitled to recover the value of the oyster shells and the cost of labor in depositing them upon the beds.

Both these operations, in 1936 and 1937, were tests and experiments in attempting to reclaim oyster beds which plaintiff knew had been affected by the dredging operations. Particularly is this true in the operations during 1937. Plaintiff had reasonable cause to believe that these dredging operations would continue and from its experience knew that the dredging operations were causing mud and silt to be carried in the currents to all parts of the beds and that there was no way of definitely knowing at which point this mud and silt would settle. As a business company attempting to continue its business as in former years, during adverse conditions, and in attempting to minimize its damage, plaintiff was justified in planting the shells in the hope of favorable results, and is entitled to recover a reasonable value for the shells and the cost of depositing them on the beds.

We are unable to find from the record, however, that, as a matter of fact, the results would have been favorable, that is to say, that plaintiff would with certainty, in the absence of a deposit of silt, have obtained a harvest of seed oysters in whole or in part. To allow the value of seed oysters, which might have grown on these shells, is to allow speculative damages. No speculative damages are allowable under the terms of the act. It is only for actual damage sustained by the oyster growers on account of dredging operations that plaintiff can recover. Plaintiff is entitled to recover $1,717.50 on this item.

Plaintiff is entitled to recover and judgment is rendered in favor of the plaintiff in the amount of $14,614.02. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

HORACE S. WHITMAN v. THE UNITED STATES

No. 44029

CHARLES RECHT v. THE UNITED STATES

No. 44030

ROSE WEISS v. THE UNITED STATES

No. 44031

H. ROZIER DULANY, JR. v. THE UNITED STATES

No. 44033

OSMOND K. FRAENKEL v. THE UNITED STATES

No. 44034

WILLIAM L. RAWLS AND WILLIAM L. MARBURY, JR. v. THE UNITED STATES

No. 44041

RUSSELL H. ROBBINS v. THE UNITED STATES

No. 44188

FREDERIC R. COUDERT, PAUL FULLER, JR., FREDERIC R. COUDERT, JR., THOMAS K. FINLETTER, JAMES E. HOPKINS, MAHLON B. DOING, FREDERICK C. BELLINGER, THOMAS W. KELLY, GEORGE S. MONTGOMERY, JR., AND PERCY A. SHAY, COPARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF COUDERT BROTHERS, v. THE UNITED STATES

No. 44354

VICTOR E. GARTZ v. THE UNITED STATES

No. 44392

BORIS BRASOL v. THE UNITED STATES

No. 44393

BASIL B. ELIASHEVITCH v. THE UNITED STATES

No. 44487

[Decided March 2, 1942]

On the Proofs

Attorneys' fees in "Russian Volunteer Fleet" case.—Judgment entered in Nos. 44030, 44354, 44392, and 44188 under the special jurisdictional Act of June 25, 1939, and petitions dismissed in Nos. 44029, 44031, 44033, 44034, 44041, 44393, and 44487.

The Reporter's statement of the case:

Mr. Horace S. Whitman, with whom was *Mr. Osmond K. Fraenkel*, for the plaintiff in No. 44030.

Mr. H. J. Gerrity for the plaintiff in No. 44188.

Mr. Mahlon B. Doing for the plaintiff in No. 44354.

Mr. J. F. Staley for the defendant in each case.

Nos. 44029, 44031, 44033, 44034, and 44041, submitted on argument made in No. 44030.

Nos. 44392, 44393, and 44487 submitted on argument made in No. 44354.

The facts sufficiently appear from the order of the court, as follows:

ORDER

These cases come before the court under a special act of Congress approved June 25, 1938, 52 Stat. 1399, which reads as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That jurisdiction is hereby conferred upon the Court of Claims of the United States to hear, determine, and render judgment on the claims of the attorneys for the plaintiff in the case entitled "Russian Volunteer Fleet against United States, Numbered 69–A" for the fair and reasonable value of legal services rendered by them and reasonable disbursements incurred by them, in the prosecution of said case prior to November 16, 1933; *Provided*, That no suit shall be instituted pursuant to this Act after the expiration of six months from the date of its approval."

Plaintiffs filed their petitions in the Court of Claims within the statutory period; and the commissioner of the

court to whom the cases were referred filed his report thereon September 29, 1941.

On February 3, 1942, these cases were argued before the court by the respective parties; and after consideration thereof and of exceptions filed to the commissioner's report, and the briefs in the cases,

IT IS ORDERED this 2d day of March 1942 that judgments in the amounts stated below be and the same are entered in favor of the plaintiffs named as the fair and reasonable value of the legal services rendered by them in the case of the *Russian Volunteer Fleet* v. *The United States*, No. 69–A,* to wit:

"CHARLES RECHT (No. 44030) and the attorneys associated with him—one hundred twenty-five thousand dollars ($125,000);

"COUDERT BROTHERS (No. 44354) and the attorneys associated with them—ten thousand dollars ($10,000);

"VICTOR E. GARTZ (No. 44392) and his associate RUSSELL H. ROBBINS (No. 44188)—eight thousand dollars ($8,000)."

IT IS FURTHER ORDERED that in addition to the foregoing amounts there be and hereby are allowed to the certain plaintiffs named below the amounts stated as reimbursement of the reasonable disbursements incurred by them in the prosecution of said case No. 69–A, to wit:

"CHARLES RECHT (No. 44030) and the attorneys associated with him—thirteen thousand seven hundred sixty-eight dollars and seventy-four cents ($13,768.74);

"COUDERT BROTHERS (No. 44354)—three thousand eight hundred forty-three dollars and twenty-three cents ($3,843.23)."

The petitions of HORACE S. WHITMAN (No. 44029); ROSE WEISS (No. 44031); H. ROZIER DULANY, JR. (No. 44033); OSMOND K. FRAENKEL (No. 44034); WILLIAM L. RAWLS and WILLIAM L. MARBURY, JR. (No. 44041); BORIS BRASOL (No. 44393); and BASIL B. ELIASHEVITCH (No. 44487) are hereby dismissed.

By the Court.

RICHARD S. WHALEY,
Chief Justice.

*For opinion in the *Russian Volunteer Fleet* case (No. 69–A) see 68 C. Cls. 32; reversed by the Supreme Court, 282 U. S. 481; 71 C. Cls. 785.



CASES DECIDED

IN

THE COURT OF CLAIMS

December 1, 1941, to March 31, 1942

INCLUSIVE, UNDER THE ACT OF JUNE 25, 1938, TO RECOVER INCREASED COSTS IN CONNECTION WITH GOVERNMENT CONTRACTS RESULTING FROM THE ENACTMENT OF THE NATIONAL INDUSTRIAL RECOVERY ACT*

DOUGLAS AIRCRAFT COMPANY, INC., A CORPORATION, v. THE UNITED STATES

[No. 44199. Decided December 1, 1941]

On the Proofs

Extra labor costs under National Industrial Recovery Act; date of completion of contract; claim not timely filed.—Where in fulfillment of a contract with the Government for construction of 24 airplanes the twenty-fourth and final airplane was delivered and accepted December 7, 1934, and the final shipment of technical data was made February 6, 1935, which constituted completion of the contract with the exception of certain spare parts, required under a change order, shipped on February 26, 1935; and where the claim under said contract was forwarded with a letter dated August 28, 1935, and where the notarial certificate attached to and verifying said claim was dated September 3, 1935; it is *held* that the earliest date on which said claim could have been filed was September 3, 1935, and accordingly plaintiff is not entitled to recover for said claim under the provisions of the Act of June 16, 1934, as amended by the Act of June 25, 1938, requiring that claims of contractors for increased costs incurred as a result of the enactment of the National Industrial Recovery Act should be filed within 6 months after the completion of the contract.

*See vol. 92, pp. xxiii–xxix.

Same; claims timely filed.—Where timely claims were filed in connection with two additional contracts between plaintiff and the Government; it is *held:*

Plaintiff is entitled to recover for items of increased costs incurred after November 27, 1933, in connection with the employees who entered its service prior to November 27, 1933;

Plaintiff is entitled to recover for items of increased costs in connection with employees who entered its service after November 27, 1933, for the period between November 27, 1933, and June 2, 1934.

The Reporter's statement of the case:

Mr. Ward H. Oehmann for the plaintiff. *Messrs. Rhodes, Klepinger & Rhodes* were on the briefs.

Mr. Robert E. Mitchell, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff, Douglas Aircraft Company, Inc., is a corporation engaged in the manufacture of airplanes, organized and existing under the laws of the State of Delaware, and having its principal place of business in Santa Monica, California.

Plaintiff is the sole owner of this claim and no action has been had with reference thereto by any department of the Government except as set forth in Finding 18.

2. On August 28, 1933, plaintiff signed the President's Reemployment Agreement authorized by Section 4 (a) of the National Industrial Recovery Act of June 16, 1933 (48 Stat. 195) with substituted provisions for the aircraft manufacturing industry, a copy of which, Joint Exhibit 4, is by reference made a part of this finding.

Paragraphs 3, 6, and 7 of the President's Reemployment Agreement, with the said substituted provisions, are as follows:

(3) Factory or mechanical workers or artisans shall not be employed more than 40 hours per week, averaged over a 3 months' period; provided, however, that such employees shall not be employed more than 48 hours per week. Employees shall receive time and one-third for hours worked in excess of 8 hours per day.

(6) Not to pay any employee of the classes mentioned in paragraph (3) less than 40 cents per hour unless the hourly rate for the same class of work on July 15, 1929, was less than 40 cents per hour, in which latter case not to pay less than the hourly rate on July 15, 1929, and in no event less than 30 cents per hour. It is agreed that this paragraph establishes a guaranteed minimum rate of pay regardless of whether the employee is compensated on the basis of a time rate or on a piecework performance.

(7) Not to reduce the compensation for employment now in excess of the minimum wages hereby agreed to (notwithstanding that the hours worked in such employment may be hereby reduced) and to increase the pay for such employment by an equitable readjustment of all pay schedules.

There was no code of fair competition adopted by the aircraft manufacturing industry.

3. On August 28, 1933, the date upon which the agreement was signed, plaintiff reduced the schedule of working hours in its shop from 47½ to 40 hours a week and began paying one and one-third times the regular hourly rate of pay for hours in excess of 8 per day.

At the time the agreement was signed the plaintiff published a notice to its employees as follows:

VERY IMPORTANT TO OUR EMPLOYEES

(1) The Aeronautical Industry has signed a Code which has the approval of the Policy Board of the National Recovery Administration and which Code specifies that until further notice from and after August 28, 1933, no factory labor shall be employed for more than 40 hours a week averaged over a 3 months' period with not more than 48 hours in any one week.

(2) Time and one-third pay for overtime for factory labor over eight (8) hours in any one day.

(3) Office help, 40 hours a week averaged over a period of one month with not more than 48 hours in any one week.

(4) No one under 16 years of age will be employed.

(5) Minimum wages for hourly workers will be 40¢ an hour, and to salaried employees $16.00 a week.

For the present no increase in hourly rates will be made to compensate for the shorter week, for the following reasons:

(a) This Company has unfilled contracts with the United States Government, prices of which are based on the present cost of labor, and we have been informed by the purchasing departments of the Government that they will not increase our prices to take care of any increase in cost of labor due to the National Recovery Act.

(b) While this company is desirous and intends to make some equitable readjustment of the hourly rates of pay because of the shorter work week, this question is one that has to be arrived at thru the Aeronautical Chamber of Commerce of America, with the other members of the aircraft industry. We are working on this subject and hope shortly to have definite policy in this regard to announce to you. (Joint exhibit No. 10, made a part hereof by reference.)

Plaintiff does not make any claim in the present suit for any increased costs incurred prior to November 27, 1933, as the result of such overtime wage increases and reduction in working hours.

4. On November 27, 1933, after various negotiations and correspondence with officials of the National Recovery Administration concerning compliance by the plaintiff with the terms of the President's Reemployment Agreement, and for the purpose of complying with the provisions of that agreement, the plaintiff changed the rates of wages paid to its employees by granting a pay increase of approximately 10 percent to all the employees then on its rolls, with the exception of 15 newly hired men to whom this increase was not extended and 4 other men who had been given a raise in excess of 10 percent a few months prior to November 27, 1933.

Prior to this increase plaintiff had an established minimum wage of 40 cents an hour, with the exception of a few high-school boys working in the plant as apprentices.

When the increase took place the 40-cent minimum rate disappeared from the pay rolls and became 44 cents an hour.

5. On November 27, 1933, at the time of the 10 percent pay increase, there were approximately 640 shop employees in plaintiff's plant, and in the following six months this number was increased to approximately 2,200.

Plaintiff, during the period involved in the present action, had no fixed wage scale in its factory, and there is no

evidence of any given rate for a given character of work. The salary of a new employee was fixed by the departmental foreman in collaboration with the personnel department and the factory superintendent after an interview was had with the employee relative to his qualifications and experience.

The wage brackets for the several types of work in the shop showed that a definite increase in wages was paid during the period between November 27, 1933, and June 2, 1934, to employees who were engaged after November 27, 1933. However, after June 2, 1934, the record shows that the wages of these same employees reverted to practically the same level that existed for the same type of employees for the period prior to November 27, 1933.

6. An analysis of the average wage of plaintiff's shop employees at intervals of six months was made for a three-year period. This analysis, defendant's Exhibit D, is by reference made a part of this finding.

The following tabulation contains data and computations from this analysis from June 1932 to December 1934, inclusive:

Item	Date	Number employees	Difference	Average wage	Difference	Percent change
1	6-4-32	685		$0.60		
2	12-3-32	592	93 decrease	.614	$0.014 increase	+2.33
3	6-3-33	827	233 increase	.598	.016 decrease	−2.60
4	12-2-33	643	184 decrease	.672	.074 increase	+12.37
5	6-2-34	2,204	1,561 increase	.581	.091 decrease	−13.54
6	12-1-34	1,989	215 decrease	.595	.014 increase	+2.41

7. When plaintiff at the time of signing the President's Reemployment Agreement changed the schedule of hours in its shop, a system of maintaining individual records of hours worked in excess of 40 a week was established, and employees who worked more than 40 hours a week were required to take compensating time off so that their average hours for a three months' period would not exceed 40 a week. As previously stated, one and one-third times the regular rate was paid for more than 8 hours a day, but employees were permitted to work 48 hours a week, or 6 days at 8 hours a day, without overtime pay. During November

1933 this was changed in order to provide overtime pay for hours in excess of 40 a week as well as 8 a day.

The increased shop labor cost due to payment of this overtime subsequent to November 27, 1933, is included in the present action. Engineering employees, except for the loft and template department, and indirect labor such as maintenance men, were not paid the overtime rate, and they are not included.

THE GOVERNMENT CONTRACTS

8. Plaintiff entered into contract W–535–ac–5450 with the Army Air Corps for the manufacture of one amphibian observation airplane Model YO–44, for a consideration of $185,000. This contract, dated November 18, 1932, received official approval of the Assistant Secretary of War on December 7, 1932, and specified delivery of the airplane 340 days from that date, or by November 12, 1933.

Plaintiff was to furnish under the contract certain technical data, drawings, and maintenance instructions prior to or concurrent with the delivery of the airplane.

Under the terms of the contract the defendant was to furnish the plaintiff with the engines and certain equipment and materials specified therein.

The airplane was delivered February 22, 1935, and the final shipment of technical data on February 27, 1935, completed the contract.

The airplane was of a new, experimental type, and various deviations and changes in design were ordered by the defendant as the work progressed. Some of these changes required redesigning and reengineering work on the part of plaintiff with a consequent delay, and defendant was not always able to furnish information and equipment to plaintiff when needed. Some of the delay may be attributable to engineering mistakes by plaintiff and the failure of some of the work to meet contract requirements, but it is impossible to determine from the record any allocation of delay or extension of time to either plaintiff or defendant.

A copy of this contract and the accompanying change orders, engineer orders, and deviations, Joint Exhibit 1, is by reference made a part of this finding.

9. A change order, No. 2, was issued under Article 2 of the contract, this change order being signed by H. H. Wetzel, Vice President, on behalf of the Douglas Aircraft Company, on November 20, 1934, and being approved by the Assistant Secretary of War under date of December 21, 1934, and, therefore, subsequent to the enactment of the National Industrial Recovery Act and the increased wage scale put in effect by plaintiff. This change order specified added equipment, which resulted in an increase of $744.50 in the contract price.

Plaintiff did not request any extension of contract time in connection with this or other change orders, and none was granted by defendant.

10. Plaintiff entered into contract W-535-ac-5743 with the Army Air Corps for the manufacture of 24 Douglas observation planes, type O-43A, together with spare parts, technical data, maintenance instructions, etc., as set forth by the contract and specifications, for a total consideration not in excess of $440,304.

This contract, dated February 28, 1933, was officially approved by the Assistant Secretary of War March 2, 1933, and specified delivery of the airplanes not later than seven months and two weeks after the contract date, or by October 16, 1933. Delivery of the spare parts and various items of technical data was required at certain specified intervals, delivery of the spare parts to be made by November 16, 1933, and the technical data by December 1, 1933.

The defendant agreed to furnish the engines and certain equipment and materials set forth in the specifications.

A copy of this contract and the accompanying change orders, Joint Exhibit 2, is by reference made a part of this finding.

11. There were five change orders issued in connection with the above contract under Article 2 thereof, change orders Nos. 1, 4, and 5 resulting in an increase of $35,866 in the contract price, and change orders Nos. 2 and 3 resulting in a decrease of $165.80, the change orders therefore resulting in a net increase of $35,700.20.

Change order No. 1 was signed on behalf of the Douglas Aircraft Company under date of January 16, 1934, being

approved by the Assistant Secretary of War under date of January 24, 1934, and therefore subsequent to the enactment of the National Industrial Recovery Act, and the increased wage scale put in effect by plaintiff. This change order specified added equipment, which resulted in an increase of $29,730 in the contract price.

Change order No. 4 was signed on behalf of the Douglas Aircraft Company under date of May 26, 1934, being approved by the Assistant Secretary of War under date of June 15, 1934, and therefore subsequent to the enactment of the National Industrial Recovery Act and the increased wage scale put in effect by the plaintiff. This change order also specified added equipment, which resulted in an increase of $1,636 in the contract price.

Change order No. 5 was signed on behalf of the Douglas Aircraft Company under date of August 14, 1934, being approved by the Assistant Secretary of War under date of August 28, 1934, and therefore subsequent to the enactment of the National Industrial Recovery Act and the increased wage scale put in effect by the plaintiff. This change order changed the type of one of the airplanes from type O-43A to XO-46 by providing for the installation of a different type of engine, together with the necessary structural changes.

Plaintiff was also required to furnish certain parts and technical data, and the delivery date for the altered airplane was extended to 120 days from the date of the change order. This change order resulted in an increase of $4,500 in the contract price.

The plane was delivered October 8, 1934, within the time as extended.

No other extension to the contract time other than that stated in connection with change order No. 5 was requested by plaintiff or granted by the defendant.

12. The delay in the completion of this contract was due to various factors. Defendant was unable to supply some of the technical information and some of the equipment, such as engines, to the plaintiff at the time such equipment was needed by plaintiff.

Plaintiff accomplished very little of the parts fabrication prior to October 1933, and thereafter was delayed because some of them would not fit or function satisfactorily. Plaintiff had difficulty in making certain of the planes satisfy specification requirements, and considerable time was lost in changing and reworking them.

Many of the delays were coextensive with others, and it is impossible to determine from the record any allocation of delay or extension of time to either plaintiff or defendant.

13. The following facts and data relate to the completion of this contract:

A time-distribution chart in reference to work performed in connection with the contract, plaintiff's Exhibit 2, made a part hereof by reference, indicates a completion of engineering hours on or about November 30, 1934, and of shop hours on December 10, 1934.

The twenty-fourth and final airplane called for under the contract was delivered December 7, 1934, and the final shipment of technical data was made February 6, 1935.

Certain O-43A fabricated parts not required on the XO-46 plane, the plane altered by change order No. 5, and which were required to be delivered to the Government by such change order, were shipped on February 26, 1935. This was the final shipment of spare parts.

The contract specified that the spare parts for the type O-43A airplanes should be accepted at the contractor's plant.

A copy of the Government inspector's weekly reports, defendant's Exhibit I, is by reference made a part of this finding.

14. On April 11, 1935, defendant advised plaintiff that, according to its parts list, it had furnished to the Air Corps in the parts shipment of January 9, 1935, certain spare parts comprising some cables and shields which did not apply to the type O-43A airplanes. On plaintiff's request these parts were returned to the factory for reworking.

A schedule of dates of shipments, billings, and payments with reference to this contract (W-535-ac-5743), defendant's Exhibit C, is by reference made a part of this finding.

This schedule shows payment on March 25, 1935, of $2,111 and on March 31, 1935, of $8 on an invoice of February

12, 1935, for certain spare parts shipped under dates of September 13, 1934, January 9, 1935, and February 1, 1935.

The last payment made to plaintiff under this contract was in the amount of $900 and was made in August 1935. This was for item 6 of the contract, "Handbook of Instructions with Parts Catalog and Price List Compilations," which had been shipped to defendant on August 2, 1934. Plaintiff did not invoice this handbook to the Government until March 22, 1935.

On June 10, 1936, attention of the plaintiff was called to the fact that certain sheets were missing from the numerical price list furnished in connection with this contract and with the request that Vandycks or photographic negatives of these sheets be furnished.

In August 1937, the plaintiff forwarded to the Air Corps Supply Officer the revised parts list changes and Vandycks.

15. On May 29, 1933, plaintiff entered into a contract, No. 31543, with the Navy Department for the manufacture of one X-02D airplane and agreed to furnish certain items of technical data and information for a consideration of $105,-000, defendant agreeing to furnish to plaintiff certain material, described by the specifications, for installation in the airplane. Delivery of the plane was required by November 1, 1933, and the final corrected technical data within thirty days from that date.

The airplane called for by the contract was of an experimental nature and plaintiff had begun preparatory engineering work over two months before the contract date. As the work progressed, certain unforeseen changes in design of the various parts occurred which caused delays not attributable either to plaintiff or defendant. There were some slight delays in the furnishing of certain parts to plaintiff by defendant such as a fuel gauge, pumps and pump fittings, but no evidence that these caused any material delay in the contract.

A time chart, plaintiff's Exhibit 7, which is by reference made a part of this finding, indicates continuous progress of both engineering and shop work on this contract.

On November 8, 1933, plaintiff requested a 60-day extension of time for the delivery of the airplane and final cor-

rected data, stating difficulty was experienced in procuring raw materials and in aileron design. The requested extension of time was granted by defendant on November 28, 1933.

The airplane was completed and ready for delivery on April 30, 1934, and the final technical data were shipped in June 1934. After delivery of the airplane to the Government, tests by the Navy developed the presence of certain difficulties in connection with the plane, and the airplane was subsequently returned to the Douglas Aircraft plant and some additional work done thereon. The ultimate contract price was adjusted pursuant to the bonus penalty clause in the contract covered by items 35 and 36 of the contract.

A copy of this contract, and accompanying change orders, Joint Exhibit 3, is by reference made a part of this finding.

16. Several change orders were issued in connection with this contract, one of which resulted in an increase of the contract price of $170.87. This change order, No. 4, was entered into under date of November 10, 1933, subsequent to the enactment of the National Industrial Recovery Act and the published notice of plaintiff to its employees (Finding 3), and prior to the wage increase of November 27, 1933.

Plaintiff did not request any extension to the contract time in connection with these change orders and none was authorized by the defendant.

17. Within the limitation period as prescribed by Section 4 of the act of June 16, 1934 (48 Stat. 974), plaintiff filed claims for increased costs incurred in the performance of War Department contract W–535–ac–5450 and Navy Department contract No. 31543.

These claims, which were in the amounts of $12,662.45 for the War Department contract and $3,262.68 for the Navy Department contract, were denied by the Comptroller General on March 25, 1937, and January 13, 1936, respectively.

18. On or about September 3, 1935, plaintiff filed a claim under the act of June 16, 1934, *supra*, in the amount of $19,240.58 for increased costs incurred in the performance of War Department contract W–535–ac–5743. On March 25, 1937, the Acting Comptroller General denied this claim,

and on November 22, 1938, after a reconsideration of the claim, again denied the same.

The date of filing of this claim was more than six months subsequent to the delivery and shipment dates of the airplanes, parts, and data, as specifically set forth in Finding 13.

Copies of the submitted claims, Joint Exhibits 5, 6, and 7, are by reference made a part of this finding.

19. Proof of the claims and supporting data were submitted to defendant in accordance with the order entered by the Court of Claims on February 1, 1939, and as provided by such order an audit of plaintiff's books and records was made by defendant's accountant, with the cooperation of plaintiff's accountant. A copy of the audit and work sheets, Joint Exhibit 8, is by reference made a part of this finding.

The parties have stipulated the following schedule as a correct statement and segregation of the amounts involved. The first and second columns of the schedule are an allocation of plaintiff's claim, as to increased labor costs due to hourly rates, between old employees on the pay rolls on November 27, 1933, and new employees hired after that date.

The increased cost due to overtime is not affected by the computations relative to old and new employees since overtime was paid on the basis of one and one-third times the actual rate received by the employee, irrespective of whether he was an old or new employee.

	Increased costs due to hourly rates		Increased costs due to payment of overtime	Total increased costs
	Employees hired prior to 11/27/33	Employees hired after 11/27/33		
Contract #5450:				
Original contract	$4,468.31	$5,601.94	$2,446.35	$12,516.60
Change order #2	17.98	22.54	9.84	50.36
Total	4,486.29	5,624.48	2,456.19	12,566.96
Contract #5743:				
Original contract	7,095.36	8,895.49	1,502.03	17,492.88
Change order #1	482.90	605.42	102.23	1,190.55
Change order #4	26.57	33.31	5.62	65.50
Change order #5	73.09	91.63	15.47	180.19
Total	7,677.92	9,625.85	1,625.35	18,929.12
Contract #31543:				
Original contract	1,275.15	1,598.66	390.00	3,263.81
Change order	2.08	2.60	.63	5.31
Total	1,277.23	1,601.26	390.63	3,269.12

20. Plaintiff in the performance of its War Department contract W-535-ac-5450 actually incurred the sum of $9,540.14 increased labor cost as the result of the enactment of the National Industrial Recovery Act.

This sum is based upon the increased wage scale paid to the old employees and the overtime wages paid to both the old and new employees in the performance of the contract as contained in the schedule set forth in the previous finding. It also includes the increased wage scale of the new employees for the period November 27, 1933, to June 2, 1934. It excludes any increased labor costs due to the change order as set forth in the above schedule.

21. Plaintiff in the performance of its Navy contract No. 31543 actually incurred the sum of $2,414.38 increased labor cost as the result of the enactment of the National Industrial Recovery Act.

This sum is based upon the increased wage scale paid to the old employees and the overtime wages paid to both the old and new employees in the performance of the contract as contained in the schedule set forth in Finding 19. It also includes the increased wage scale of the new employees for the period November 27, 1933, to June 2, 1934. It excludes any increased labor costs due to the change order as set forth in the above schedule.

The court decided that the plaintiff was entitled to recover on claims timely filed.

JONES, *Judge*, delivered the opinion of the court:

The plaintiff corporation is engaged in the manufacture of airplanes. It entered into three contracts to build planes for the Government. Two of these contracts were with the Army and one with the Navy. The first Army contract, dated November 18, 1932, called for the construction of an observation plane for the Army at a cost of $185,000.00. The second contract with the Army, dated February 28, 1933, called for the manufacture of 24 observation planes at a total cost of $440,304.00. The third contract, which was with the Navy, provided for the manufacture of one airplane and the furnishing of certain items of technical data for

the consideration of $105,000.00. The contract was dated May 29, 1933.

The plaintiff institutes this suit to recover increased costs incurred in the construction of these planes, claiming that such costs were due to the enactment of the National Industrial Recovery Act (48 Stat. 195).

The action is brought pursuant to the Act of Congress approved June 25, 1938 (52 Stat. 1197), conferring jurisdiction on the Court of Claims to hear, determine, and enter judgment against the United States upon the claims of contractors for increased costs incurred as a result of the enactment of the National Industrial Recovery Act, *supra*.

We will first consider the second Army contract, No. W-535-ac-5743, which calls for the construction of 24 airplanes for the Army. As to the claims arising under this contract, the defendant pleads that they were not filed within the six months' period provided for in the jurisdictional act of June 16, 1934 (48 Stat. 974), and carried forward in the amendatory act of June 25, 1938, *supra*.

The 24th and final airplane called for under this contract was delivered and accepted December 7, 1934, and the final shipment of technical data was made February 6, 1935. This constituted completion of the contract with the exception of certain spare parts required under a change order, and which were shipped on February 26, 1935.

The claim under this contract was filed on or after September 3, 1935. A letter which accompanied the claim was dated August 28, 1935, but the notarial certificate attached to the claim and verifying it was dated September 3, 1935. The earliest date, therefore, on which the claim could have been filed was September 3, 1935. Thus, more than six months had elapsed from the time of the completion of the contract.

Plaintiff undertakes to bring the claim within the six months' period by calling attention to the fact that as late as March 2, 1935, it entered some record charges against the contract, and since the letter accompanying the claim was dated August 28, 1935, the six months' period had not elapsed.

The latter date, however, is contrary to the stipulation of the parties and contrary to the facts in the case which show the claim was filed on or after September 3, 1935.

Plaintiff also called attention to the fact that in April 1935 it was discovered by the Air Corps headquarters at Wright Field, Ohio, that, according to plaintiff's shipping ticket accompanying the shipment of spares made on January 9, 1935, to the Air Depot at San Antonio, Texas, plaintiff had furnished two parts, a cable and shield, which were not applicable to this type of airplane. On plaintiff's request these parts were returned to it for correction. On June 10, 1936, the Air Corps advised plaintiff that certain sheets of photographic negatives were missing from the parts list furnished under the contract, and on July 17, 1936, after an exchange of correspondence about the missing sheets, plaintiff sent the Air Corps another set of parts list negatives. Delivery of the parts list had been made by plaintiff on August 24, 1934, and payment therefor made on November 30 and December 4, 1934. These were minor errors that frequently develop in the handling of delicate and complicated machinery. To hold that such corrections constituted a continuation of the contract would mean that contracts would thus be continued almost indefinitely.

The Act of June 25, 1938, confers jurisdiction on the Court of Claims in connection with contractors and others "whose claims were presented within the limitation period defined in section 4 of the Act of June 16, 1934." Section 4 of the Act of June 16, 1934, *supra*, reads in part as follows:

> No claim hereunder shall be considered or allowed unless presented within six months from the date of approval of this Act or, at the option of the claimant, within six months after completion of the contract.

According to the terms of this limitation, the claims under this contract were not filed within the six months' period and the court is therefore without jurisdiction to make any award.

Timely claims were filed in connection with the other two contracts.

The airplanes called for in both the Army and the Navy contracts were of a new, experimental type. Various devia-

tions and changes in design were ordered by the defendant as the work progressed. Some of these changes required redesigning and reengineering work on the part of the plaintiff, with a consequent delay. These delays, change orders, and corrections were the natural result of the building of new and experimental types of planes. Neither plaintiff nor defendant offers any material complaint regarding such change orders, corrections, and consequent delays.

In the performance of the War Department Contract W-535-ac-5450 plaintiff actually and necessarily incurred increased labor costs in the sum of $9,540.14 as a result of the enactment of the National Industrial Recovery Act.

In the performance of its Navy contract No. 31543 plaintiff actually and necessarily incurred increased labor costs in the sum of $2,414.38 as the result of the enactment of the National Industrial Recovery Act.

The schedule set out in Finding 19 and the explanation made in Findings 20 and 21 show a detailed analysis of these sums.

The items of increased costs were audited and definitely ascertained by the auditors of the Federal Bureau of Investigation and by an auditing firm representing the plaintiff corporation.

These items are also set out in the agreement stipulated by the parties to the suit.

The plaintiff is entitled to recover the items of increased costs after November 27, 1933, in connection with employees who entered its service prior to November 27, 1933.

It is also entitled to recover the increased costs of employees hired after November 27, 1933, for the period between November 27, 1933, and June 2, 1934.

After June 2, 1934, the average pay roll for these employees shows a decrease to practically the same level that existed prior to November 27, 1933. While the evidence for this period is not altogether satisfactory, it is sufficient to establish the fact that the minimum wage reverted to 40 cents per hour, the rate which had prevailed prior to November 27, 1933, and plaintiff is not entitled to recover for this period.

The items allowed cover the wage scale paid to the employees as indicated and for the periods mentioned. They also cover overtime wages paid to both old and new employees for the entire period after November 27, 1933.

The plaintiff is entitled to recover the sum of $11,954.52. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

No. 44358. FEBRUARY 2, 1942

Josephson Manufacturing Company.

On plaintiff's motion for judgment with allowance of interest (to which the defendant filed an objection with respect to the item of interest) and upon a stipulation by the parties as to the amount of increased costs in connection with the performance of the contract, and upon a report and recommendation of a commissioner of the Court of Claims, judgment was allowed for the plaintiff in the sum of $1,028.98, and judgment as to interest was disallowed.

JUDGMENTS ENTERED

In accordance with the provisions of the Act of June 25, 1938 (52 Stat. 1197) and on motion of the several plaintiffs (to which no objection had been filed by the defendant), and upon the several stipulations by the parties, and in accordance with the report of a commissioner in each case recommending that judgment be entered in favor of the respective plaintiffs in the sums named, it was ordered that judgments be entered as follows, for increased costs under the National Industrial Recovery Administration Act:

ON DECEMBER 1, 1941

No. 44274.	S. Morgan Smith Company, a Corporation	$3,935.06
No. 44499.	Logan Company	962.07
No. 44500.	Logan Company	96.09
No. 44501.	Logan Company	114.46
No. 44502.	Logan Company	82.13
No. 44503.	Logan Company	68.43
No. 44504.	Logan Company	84.76

ON JANUARY 5, 1942

No. 44032.	Crocker-Wheeler Electric Manufacturing Co	29.67
No. 44037.	The United Clay Products Co	2,566.81
No. 44214.	Fort Worth Sand & Gravel Co	191.32
No. 44479.	Bath Iron Works Corporation	66,903.36

ON MARCH 2, 1942

No. 44212.	Missouri Hardstone Brick Company	1,612.65
No. 44277.	The Great Lakes Engineering Works	4,000.37
No. 44548.	The Baker-Whiteley Coal Company	1,193.50
No. 44554.	James K. Lynch, Trustee	6,814.86

PETITIONS DISMISSED

On motion of the several plaintiffs to dismiss the petitions therein, the petition in each of the following cases under the Act of June 25, 1938, was dismissed:

ON DECEMBER 1, 1941

44213. Atlantic Creosoting Company, Inc.
44368. The Wage Marble & Tile Co.
44369. The Wage Marble & Tile Co.
44452. The Maxwell Paper Company.

ON JANUARY 5, 1942

44192. Marietta Chair Company.
44194. Bush Brothers.
44231. Deslauriers Steel Mould Company, Inc.
44400. Rochester Ropes, Inc.
44450. North American Building Corporation.
44505. L. A. Clarke & Son, Inc.
44543. New York Credit Men's Association.
44546. Artility Metal Products, Inc.

ON FEBRUARY 2, 1942

44290. Kraftile Company.
44565. Warren E. Earhart, Trustee.

CASES DECIDED

IN

THE COURT OF CLAIMS

December 1, 1941, to March 31, 1942

INCLUSIVE, IN WHICH, EXCEPT AS OTHERWISE INDICATED, JUDGMENTS WERE RENDERED WITHOUT OPINIONS

No. 43196. DECEMBER 1, 1941

La Grange Gold Dredging Company, A Corporation.

Gold bullion; newly mined gold; Act of March 9, 1933. Decided upon the authority of *Alaska Juneau Gold Mining Company (a corporation)* v. *The United States*, 94 C. Cls. 15. The court in an opinion *per curiam* decided:

> The material facts in this case are substantially the same as the facts in *Alaska Juneau Gold Mining Company (a corporation)* v. *United States*, decided June 2, 1941 (94 C. Cls. 15). The question presented is the same.
>
> Upon the facts disclosed and for the reasons set forth in the opinion in *Alaska Juneau Gold Mining Company (a corporation)* v. *United States*, *supra*, the court is of the opinion that the receipt and payment for plaintiff's gold bars were subject to and governed by the statutes, Executive Orders, and the regulations prior to the Executive Order of August 29, 1933, and Treasury Regulations of September 12, 1933, and that plaintiff is not entitled to recover. The petition is therefore dismissed. It is so ordered.

No. 43857. DECEMBER 1, 1941

Rivers J. Morrell, Jr.

Pay and allowances; lieutenant U. S. Marine Corps; dependent mother.

In accordance with its opinion of June 3, 1940, holding that the plaintiff was entitled to recover (91 C. Cls. 302)

and upon a report from the General Accounting Office showing the amount due plaintiff under the court's opinion, judgment for the plaintiff was entered in the sum of $216.00.

CONGRESSIONAL No. 17472. DECEMBER 1, 1941

American Cotton Oil Company.

In the case of the American Cotton Oil Company, to the use of Hecker Products Corporation, pursuant to the stipulation filed in the case of Rose City Cotton Oil Mill, Congressional No. 17341, and all other pending cotton linter cases as per list attached to said stipulation, and upon a stipulation and agreement of the parties, judgment for the plaintiff was entered in the sum of $276,582.29.

CASES INVOLVING GOVERNMENT CONTRACTS

On authority of the court's decision in the case of *Crooks Terminal Warehouses, Inc.* No. 44099, 92 C. Cls. 401, and in accordance with stipulations by the respective parties in each case and upon a report of a commissioner recommending that judgment be entered in favor of the respective plaintiffs in the amounts below set forth, judgments were entered, December 1, 1941, as follows:

No. 44115. Crooks Terminal Warehouses, Inc	$514.44
No. 44116. Texas and Pacific Terminal Warehouse Company	1,321.72
No. 44117. Western Gateway Storage Company	31.43
No. 44118. Adams Transfer & Storage Company	260.78
No. 44119. North Pier Terminal Company	1,188.55
No. 44120. Ford Bros. Van & Storage Co	51.82

No. 43919. FEBRUARY 2, 1942

Kansas Flour Mills Corporation.

Government contract; nonpayment of processing tax. Judgment for the plaintiff. Opinion 92 C. Cls. 390.

Reversed by the Supreme Court, December 8, 1941; 314 U. S. 212; *post* p. 769.

In accordance with the mandate of the Supreme Court, reversing the decision of the Court of Claims and remanding the case for further proceedings, the petition was dismissed.

No. 44634. MARCH 2, 1942

William B. Scheibel.

Pay and allowances; lieutenant in the Coast Guard; dependent mother. Plaintiff entitled to recover. Opinion 93 C. Cls. 480.

In accordance with its opinion of April 7, 1941, and upon a report of the General Accounting Office as to the amount due thereunder, judgment for the plaintiff was entered in the sum of $2,566.20.

No. 44694. MARCH 2, 1942

James L. Harbaugh, Jr.

Pay and allowances; bachelor officer in the United States Army; dependent mother. Plaintiff entitled to recover. Opinion 93 C. Cls. 483.

In accordance with its opinion of April 7, 1941, and upon a report from the General Accounting Office as to the amount due thereunder, and upon a stipulation of the parties to the effect that during the period from April 22, 1940, to April 7, 1941, the date of the court's decision, the facts bearing upon the dependency of the mother were substantially the same, judgment was entered for the plaintiff in the sum of $4,317.33.

No. 45014. MARCH 2, 1942

Great Northern Railway Company.

On plaintiff's motion for judgment, and upon a stipulation by the parties showing that said parties had agreed to a compromise in the sum named, judgment was entered for the plaintiff in the sum of $14,000.00 for failure of the defendant to return in as good condition as when received 19 freight cars, delivered by plaintiff to the Wichita-Fort Peck Railroad, operated by the War Department.

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CASES DISMISSED BY THE COURT OF CLAIMS ON MOTION OF PARTIES, OR OF THE COURT FOR NONPROSECUTION

Cases Pertaining to Refund of Taxes

On December 1, 1941

44808. C. R. Kirk, sole stockholder.
44875. H. C. Frick Coke Co.
45004. Winifred C. Boynton, Executrix.
45007. Maude Howland Pyne.
45049. John W. Aufiero.
45235. May Cole Willingham, Executrix.

On December 2, 1941

44836. Borge-Warner Corporation.

On January 5, 1942

45305. Jersey Farm Baking Co. of Illinois.
45306. Orchard Farm Pie Company.
45307. Jersey Farm Baking Company.
45308. Abso-Fresh Bakeries, Inc.
45344. Wm. H. Block Company.

On February 2, 1942

43606. Winston Bros. Company, etc.
44696. Chester A. Willoughby, trustee.
44750. Daval Manufacturing Co.
45315. Wilson & Co., Inc.
45316. T. M. Sinclair & Co., Ltd.
45317. Wilson & Co., Inc. of Kansas.

On March 2, 1942

44630. American Paper Goods Company

Cases Involving Indian Claims

On January 5, 1942

44295. Menominee Tribe of Indians
44297. Menominee Tribe of Indians

On February 2, 1942

L–209. The Seminole Nation

On March 2, 1942

L–233. The Seminole Nation

Cases Pertaining To Refund of Payments Made Under Marketing Agreement

ON FEBRUARY 2, 1942

45060. Joseph E. Seagram & Sons, Inc.
45061. Brown-Forman Distillery Company.
45065. A. Overholt & Co., Inc.
45066. National Distillers Products Corporation.
45068. Commercial Solvents Corporation.
45069. Glenmore Distilleries Company.
45071. Frankfort Distilleries, Inc.
45072. Hiram Walker & Sons, Inc.
45074. The Old Quaker Co.
45075. The Frank L. Wight Distilling Co.
45076. Jos. S. Finch & Co.
45077. Geo. T. Stagg Co.
45079. Schenley Distillers Corporation.
45083. The Baltimore Pure Rye Distilling Co.
45084. Bardstown Distillery, Inc.
45086. Century Distilling Company.

Cases Involving Government Contracts

ON JANUARY 5, 1942

44675. Robert C. Sproul, Trustee, etc.
44676. Robert C. Sproul, Trustee, etc.
44677. Robert C. Sproul, Trustee, etc.
44678. Robert C. Sproul, Trustee, etc.
44679. Robert C. Sproul, Trustee, etc.
44680. Robert C. Sproul, Trustee, etc.
44726. William F. Allen et al.

Cases Pertaining To Difference In Carrying Charges and Operating Costs; Federal Farm Board

ON JANUARY 5, 1942

(See p. 472, *ante*)

Congressional No. 17750. Alabama Cotton Cooperative Assn.
17751. California Cotton Cooperative Assn., Ltd.
17752. Georgia Cotton Growers Cooperative Assn.
17753. Louisiana Cotton Cooperative Assn.
17754. Mid-South Cotton Growers Assn.
17755. Mississippi Cooperative Cotton Assn. et al.
17756. North Carolina Cotton Growers Cooperative Assn.
17757. Oklahoma Cotton Growers Assn.
17758. S. C. Cotton Cooperative Assn.
17760. Texas Cotton Cooperative Assn.

Cases Pertaining To The Transportation of Troops

ON DECEMBER 1, 1941

44654. The Pennsylvania Railroad Co.
44682. Webster and Chapman, Trustees

Cases Involving Infringement of Patents

ON DECEMBER 1, 1941

43604. Myers Arms Corporation

Miscellaneous

ON DECEMBER 1, 1941

44009. Four Wheel Drive Auto Company
45224. Roche, Connell & Laub Construction Co.

ON JANUARY 5, 1942

45266. Ruth Widen

ON FEBRUARY 2, 1942

45328. Swift & Company
45329. Swift & Company

ON MARCH 2, 1942

45013. Great Northern Railway Co.
45017. Banks Business College
45271. Cannon Mills Company

REPORT OF DECISIONS

OF

THE SUPREME COURT

IN COURT OF CLAIMS CASES

THE UNITED STATES, PETITIONER, v. THE KANSAS FLOUR MILLS CORPORATION

[No. 43919]

[92 C. Cls. 390; 314 U. S. 212]

Certiorari (313 U. S. 554) to review a decision of the Court of Claims, following the decision in *The Ismert-Hincke Milling Company* v. *The United States*, 90 C. Cls. 27; the Court of Claims in the instant case awarding damages to the flour mills company on a contract for the sale of flour and bran, and denying the right of the United States to offset payments made by it on earlier contracts to cover processing taxes which were subsequently held to be unconstitutional so that the vendor was not obliged to pay them.

The decision of the Court of Claims in the case of *Kansas Flour Mills Corporation* was reversed on December 8, 1941, the Supreme Court deciding:

> Contracts for the purchase of flour by the Government included as part of the price any federal tax theretofore imposed by Congress applicable to the material purchased, and provided that if any processing or other tax were imposed or "changed by Congress" after the date set for opening of bids and were paid to the Government by the contractor on the supplies contracted for, then the price would be "increased or decreased" accordingly. *Held*, that the subsequent decision in *United States* v. *Butler*, 297 U. S. 1, adjudging the processing tax void, and the recognition of that holding through provisions of the Revenue Act of 1936,

amounted to a "change" of the vendor's tax liability made "by Congress," within the meaning of the contract, and that amounts paid by the Government as part of the contract price to offset processing taxes presumptively payable by the vendor but which because of that decision the vendor escaped, were recoverable by the United States.

Mr. Justice Roberts delivered the opinion of the Supreme Court, as follows:

Between May 1935 and January 6, 1936, the respondent entered into eight contracts for the sale of flour to the United States. Deliveries were duly made and the contract price was paid.

Each of the eight contracts provided:

"Prices set forth herein include any Federal tax heretofore imposed by the Congress which is applicable to the material purchased under this contract. If any sales tax, processing tax, adjustment charge or other taxes or charges are imposed or changed by the Congress after the date set for the opening of the bid upon which this contract is based and made applicable directly upon the production, manufacture, or sale of the supplies covered by this contract, and are paid to the Government by the contractor on the articles or supplies herein contracted for, then the prices named in this contract will be increased or decreased accordingly, and any amount due the contractor as a result of such change will be charged to the Government and entered on vouchers (or invoices) as separate items."

Under the terms of the Agricultural Adjustment Act,[1] processing taxes were due, in respect of the flour sold, aggregating $28,419.20.

In 1936 the respondent entered into four contracts for the sale of flour and bran to the United States for a total price of $23,288.11. The commodities were delivered and vouchers for the purchase price tendered to the General Accounting Office. Payment was withheld by the Comptroller General, who notified the respondent that the Government had overpaid it in the sum of $28,419.20.

The respondent had obtained an injunction against the collection of any processing taxes from it and, as a result of the decision in *United States* v. *Butler*, 297

[1] U. S. C. Supp. V, Tit. 7, § 609.

U. S. 1, paid no processing taxes on the wheat used in the manufacture of flour covered by the 1935 contracts.

The respondent sued in the Court of Claims to recover the purchase price under the four 1936 contracts, and contested the offsets claimed by the Government arising out of the eight 1935 contracts. Judgment was rendered in favor of the respondent for $23,288.11. 92 Ct. Cls. 390. We granted certiorari because of the importance of the question [2] and of the number of pending cases involving the same question. We are of opinion that the respondent was not entitled to recover.

The contracts are to be construed in the light of the relations between the parties at the time they were executed. The Agricultural Adjustment Act did not exempt a vendor to the United States from the processing tax; and a Treasury Regulation required that he pay the tax.[3] The quoted clause shows that this tax was specifically in the minds of the parties, for it was stipulated that it was included in the price bid. The Government stood in a dual relation to the respondent. It became, at the same time, a purchaser at the named price and also a claimant of the processing tax upon the material purchased. The stipulation was evidently made in view of the facts that the purchasing officer could not buy the goods tax-free and that the Government desired that the price to it should be ex-tax. To accomplish this the sale price was *pro tanto* offset by the amount of the tax. Plainly, if the United States had not been thought entitled to collect the tax, the bid price would not have been acceptable. Plainly, also, if the respondent had not been thought liable for the tax, the bid price would have been less.[4] As disclosed by the contracts, the understanding was that the price would have been less by the amount of the tax. The respondent disputes this, contending that we cannot say how much of the tax it was willing to absorb in order to obtain the contracts; that it may have been making the sales at an actual loss. But this is not the theory of the contracts. They provide that if, in future, any existing tax described therein is changed by Congress, the price named in each contract "will be increased or decreased accordingly." This does not mean, as contended by respondent, that the amount of increase or decrease is an

[2] *United States* v. *Hagan & Cushing Co.*, 115 F. 2d 849; *Ismert-Hincke Milling Co.* v. *United States*, 90 Ct. Cls. 27; *United States* v. *American Packing & Provision Co.*, 122 F. 2d 445.

[3] Regulations 81, Art. 9, under the Agricultural Adjustment Act.

[4] Compare *United States* v. *Glenn L. Martin Co.*, 308 U. S. 62.

unknown quantity to be made definite and certain by proof. It means that the amount of any increase in tax shall be added to, and the amount of any decrease subtracted from, the contract price. This view is strengthened by the provision for separate billing of the increase, if any.

The respondent, however, argues that, under any construction, the Government is not entitled to maintain its set-off, first, because the contracts contain no undertaking by respondent that it will pay the tax, and, secondly, that, even if they do, the stipulation for reduction of price applies only to changes by Congress and excludes relief from the tax by an adjudication that the exaction is unconstitutional.

In support of the first proposition, the respondent relies on numerous decisions holding tax clauses in private contracts not to require adjustment of the contract price as a result of the decision in the *Butler* case, *supra*.[5] These go on the absence of an express provision respecting the constitutional validity and upon the omission of the parties to bill the tax separately from the purchase price. We think they are inapplicable in the present case since the tax clause here had a purpose different from those in private contracts. As we have said, the purpose here was to deprive either party of the advantage or disadvantage resulting from the incidence of the tax; and, therefore, it was sought to eliminate the effect of the exaction on the contract price.

In the case of private contracts, the vendees purchase for resale and the tax burden assumed is passed on to their customers. The fact that the processor—the vendor—is protected from the payment of the tax by injunction does not reduce the price to the vendee or to purchasers from him. The courts will not permit the unjust enrichment involved in recovery by the vendee of the amount of tax which he has passed on to his customers.[6] In the contracts in question, the Government

[5] *Moundridge Milling Co.* v. *Cream of Wheat Corp.*, 105 F. 2d 366; *Consolidated Flour Mills* v. *Ph. Orth Co.*, 114 F. 2d 898; *United States* v. *American Packing & Provision Co.*, 122 F. 2d 445; *City Baking Co.* v. *Cascade Milling & Elevator Co.*, 24 F. Supp. 950; *G. S. Johnson Co.* v. *N. Sauer Milling Co.*, 148 Kan. 861 (1938), 84 P. 2d 934; *Sparks Milling Co.* v. *Powell*, 283 Ky. 669 (1940), 143 S. W. 2d 75; *Crete Mills* v. *Smith Baking Co.*, 136 Neb. 448 (1939), 286 N. W. 333.

[6] See the cases cited Note. 5. The respondent urges that the unjust enrichment tax imposed by Title III of the Revenue Act of 1936 (49 Stat. 1734) destroys the equity of the Government's case, but if respondent is required to reduce its price by the amount of its unpaid processing tax it will not be subject to the unjust enrichment tax on these transactions. See §§ 501 (b) (2) and 501 (j) (4).

did not buy for resale. Unless it received the tax it suffered a definite disadvantage.[7] Its purpose, as shown by the contracts, was to balance the tax element in the price paid with the tax collected.[8] The Government, which could not pass on the tax on resale, was thus protected, not against a fall in the market price but against a loss in its tax revenues. In cases of private sales, the processor's injunction against collection of the tax, as held by the cases cited, worked no harm to his vendee. A similar injunction, in the case of Government contracts, would leave the price to the Government at the higher level reflecting the tax and deprive the Government of the reciprocal benefit flowing from collection of the tax.

In its second position, the respondent attempts to meet what has been said as to the inequity of its retaining the full price, when it escapes paying the tax, with the argument that the result is inevitable under the contracts. It refers to the fact that it had already obtained an injunction against the collection of the processing tax when some of the 1935 contracts were made, and asserts that, if the Government desired to provide against a decision that the taxing act was unconstitutional, this could readily have been done by the addition of a single phrase.

As we have said, there is respectable authority for the position that tax clauses in private contracts do not reach a judicial decision of invalidity of the statute. We think, however, these decisions have no application in the present instance. Here, legislation recognizing the decision in *United States* v. *Butler*, *supra*, and imposing taxes on the enrichment of those who passed on the amount of the tax without having to pay it, may properly be said to have been a change of the tax by Congress within the terms of the contracts.

The decision in the *Butler* case was rendered January 6, 1936. It is true that after that decision a taxpayer's right to an injunction against the collection of the tax was clear.[9] But, by the Revenue Act of 1936,[10] which became a law June 22, 1936, Congress not only recognized the effect of that decision as doing away with the

[7] In *United States* v. *American Packing & Provision Co.*, 122 F. 2d 445, the Government was held entitled to maintain a set-off asserted under conditions like those here involved on the ground that the vendor had received money from the Government which in equity and good conscience it should repay.

[8] Compare *United States* v. *Cowden Mfg. Co.*, 312 U. S. 34, 36–37.

[9] *Rickert Rice Mills, Inc.* v. *Fontenot*, 297 U. S. 110.

[10] 49 Stat. 1648.

tax in question but legislated with respect to the consequent rights and remedies of those who had paid the tax and the liability of those who had passed on its burden and escaped payment.

By Title III a tax is laid on the unjust enrichment consequent upon the passing on to customers the burden of unpaid processing taxes. In § 501 (b) (i) (2) and (j) (2), Congress defines the date of termination of the tax as "in the case of a Federal excise tax held invalid by a decision of the Supreme Court, the date of such decision." In Title IV there is a provision relative to floor stock taxes which recognizes the invalidity of the Agricultural Adjustment Act by reenacting the refund provisions of that Act in respect of transactions prior to January 6, 1936, the date of the *Butler* decision. § 601 (a). The title defines a taxable commodity as one on which a processing tax was provided for as of January 5, 1936, the day before the *Butler* decision. § 602 (c) (1).

Title VII makes provision for the refund of processing taxes collected under the Agricultural Adjustment Act and is a recognition by Congress that the taxes were invalid.

Thus, a change in respondent's tax liability has been recognized and confirmed by Congress. Even though this legislative action was a confirmation of or acquiescence in the *Butler* decision, and although its effect may have been merely cumulative, it amounted to a change made by Congress in respondent's liability for the tax, within the meaning of the contracts.

The judgment is reversed.

THE UNITED STATES v. NUNNALLY INVESTMENT COMPANY

[No. 42389]

[92 C. Cls. 358; 314 U. S. 702]

Income tax records and returns on a cash basis; suit on different issues not estopped by reason of prior case.

Decided January 6, 1941; judgment for the plaintiff.

Defendant's petition for writ of certiorari *denied* by the Supreme Court May 26, 1941; 313 U. S. 584; 93 C. Cls. 778.

Upon defendant's petition for rehearing the Supreme Court on December 22, 1941, issued an order as follows:

> The petition for rehearing is granted. The order denying certiorari (313 U. S. 584) is vacated and the petition for writ of certiorari is granted.

J. A. ZACHARIASSEN & CO. v. THE UNITED STATES

[No. 43372]

[94 C. Cls. 315; 315 U. S. —]

Detention of foreign-owned vessel in wartime; refusal of clearance, exercise of war powers.

Decided June 2, 1941; petition dismissed. Plaintiff's motion for new trial overruled October 6, 1941.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court March 9, 1942.

THE FIFTH AVENUE BANK OF NEW YORK, TRUSTEE v. THE UNITED STATES

[No. 45046]

[94 C. Cls. 640; 315 U. S. —]

Income tax; date for determining holding of bonds by trustee under revocable trust.

Decided November 3, 1941; petition dismissed.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court March 30, 1942.

JOSEPHINE V. HALL v. THE UNITED STATES

[No. 44924]

[95 C. Cls. 539; 316 U. S. —]

Income tax; depreciation; amortization; recoupment.

Decided February 2, 1942; petition dismissed. *Ante*, p. 539.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court April 6, 1942.

JAMES CARLISLE BASKIN v. THE UNITED STATES

[No. 45522]

[95 C. Cls. 455; 316 U. S. —]

Right to sue for salary where employment was terminated on charges.

Decided January 5, 1942; petition dismissed. *Ante*, p. 455.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court April 27, 1942.

INDEX DIGEST

I. Where, under a Marketing Agreement between plaintiff, a nonprofit organization, and its members, on the one hand, and on the other, the United States, acting through the Secretary of Agriculture, for the disposal of the wheat surplus in 1933, entered into in accordance with the provisions of the Agricultural Adjustment Act, the plaintiff, with the approval of the Secretary of Agriculture, as required by said act, sold certain shipments of flour to the United States Government, packed and sealed for shipment to and for use in the Philippine Islands; and where all the transactions by the plaintiff with the Government, in connection with which the instant claim arose, were proposed and carried out by plaintiff and its members concerned with the knowledge and consent of the Secretary of Agriculture through his authorized representatives; it is *held* that said sale comes

DREDGING OF NAVIGABLE CHANNEL.

I. Where the Government in 1937 commenced dredging operations in the navigable channel between the Hudson and East Rivers, known as the Harlem River Canal, adjacent to the property on the waterfront of said canal belonging to the plaintiff and used by the plaintiff as a coal yard; and where shortly thereafter cracks and breaks appeared in the surface of said coal yard, and the land began to settle before dredging operations in the vicinity were discontinued; it is *held* that there was no taking by the defendant, constructive or otherwise, of plaintiff's property; and that any damage to said property to which defendant's authorized dredging operations may have contributed was indirect and consequential to the exercise by the defendant of its lawful right in maintaining a navigable waterway, and plaintiff accordingly is not entitled to recover. *Roden Coal Co., et al.*, 219.

II. The defendant did not in any way encroach upon the property rights of plaintiff, and under the facts disclosed, there is no justification for application of the principle of a constructive taking upon which to base an implied promise to pay just compensation under the Fifth Amendment, measured either by the value of the property or by the difference between the market value thereof before and after the operations by the defendant. *Id.*

III. The plaintiff acquired the property subject to the undeniable right of the United States to maintain a navigable waterway at the authorized depth and width. *Id.*

INDIAN CLAIMS.

I. Plaintiff sued the defendant for $3,266,826.22, basing its claims on four items:

(1) Failure to pay to the tribe the amount received from the sale of lands within what is known as the "Old Agency Reserve" or the "Langford Claim";

(2) Failure to pay to the tribe money received from the sale of lands allotted erroneously to nonmembers of the tribe and later canceled;

(3) Per capita payments erroneously made to nonmembers of the tribe;

(4) For gold mined and removed by nonmembers of the tribe from lands alleged to be within the plaintiff's reservation.

The case was before the Court under Rule 39 (a), and it was *held:*

(1) That plaintiff was not entitled to recover the amount received from the sale of, or for the value of, the lands in the "Old Agency Reserve" which were purchased by the defendant.

(2) That plaintiff was entitled to recover the value of the number of acres of canceled allotments which were opened to homestead entry by the proclamation of the President on November 8, 1895 (29 Stat. 873, 876) with interest at 5 percent per annum.

PATENTS—Continued.

fail to define a patent monopoly and said claims are not infringed by the Government structure and are invalid. *Id.*

VI. It is *held* that claim 14, patent No. 1,518,140, directed to a metal aeronautical propeller with blades increasing in cross section from the tip toward the hub, is indefinite with respect to patent monopoly, and is invalid, and not infringed by the Government structure. *Id.*

VII. It is *held* that claims 11, 12, and 13, patent No. 1,518,140, being directed to the material or composition of a propeller blade, and relating to the use of duralumin therein, express no patentable invention and are therefore invalid. *Id.*

VIII. On the facts disclosed by the evidence adduced, pertinent to the question of validity and infringement of patent No. 2,008,931, to Charles E. Schuler, at issue in the instant case; it is *held* that claim 4 of said patent is invalid under the prior art; that claims 5 and 7 as specifically limited are not applicable to the alleged infringing structure, and that if said claims were so interpreted as to disregard the specific limitation contained therein they, also, would be invalid in view of the prior knowledge and uses; and plaintiff is accordingly not entitled to recover. *International-Stacy Corp.*, 357.

IX. Prior to any effective dates of the Schuler invention, patent No. 2,008,931, in suit, those skilled in the art had knowledge:

(a) That both the conductivity and dielectric constant of the earth affected the distribution of current adjacent the antenna, and that a loss of energy was likely to occur by the penetration of the lines of force through the earth to a buried ground system;

(b) That a variation in the pattern of the radiated waves from the antenna would be caused by variations of conductivity in various portions of the ground under or adjacent to the base of the antenna;

(c) That a metallic ground screen located under the antenna, elevated above the surface of the ground, and grounded at various points in its periphery, would function to reduce the effects set forth in items (a) and (b) and would therefore return or reflect energy to the antenna which would otherwise be lost. *Id.*

PATENTS—Continued.

X. The beneficial effect of ground screens located at the base of the antenna was well known to those skilled in the art, and to utilize such a ground screen in connection with a pyramidal tower antenna such as is disclosed in the prior art would not produce any novel or unforeseen result and would not involve invention and claim 4 in issue is accordingly invalid. If claims 5 and 7 are so interpreted as to disregard the specific limitation contained therein as to the ground screen or metallic plate member being located on the "*ends of the insulators*," these claims will be invalidated in view of the prior knowledge and use of ground screens located at the base of the antenna. *Id.*

XI. The proof shows that the radio antenna ground screen claimed in the patent in suit is the same, or substantially the same, as ground screens previously described and used, and that it performs the same function in the same way to obtain the same results. *Id.*

XII. That which would infringe if later will anticipate if earlier. *Id.*

XIII. The plaintiff cannot assert a broad construction of its claims in order to make out a case of infringement and then narrow its claims so as to avoid anticipation. *Id.*

XIV. Where on August 25, 1941, the defendant filed a motion in each case in suit asking "for an order requiring the plaintiff to elect between the two inconsistent claims for compensation allegedly resulting from one and the same act (the use of certain radio equipment) as set forth in the petition;" and where on September 6, 1941, an order was made by the court directing plaintiff "to elect whether he will prosecute his claim as a breach of contract, or under the jurisdictional patent act, and to amend his petition accordingly;" and where, thereupon, plaintiff filed a motion asking the court to reconsider and vacate said order; and where the plaintiff later in open court amended his petition so as to state his claim in the alternative, for compensation under section 68, title 35, or section 250, title 28, U. S. C. A., rather than under both said sections of the Code, as the petitions were originally drawn; it is *held* that, aside from the possible difference in character or degree of the proof required (as to which the

SUIT FOR SALARY.

I. Where it is shown by the petition that plaintiff's employment in the Federal Service as a prison guard was first suspended and later completely terminated upon written charges which, so far as that position was concerned, were never vacated or set aside and plaintiff was never restored to that position, or advised that he would be so restored, at the salary for which he brings suit; it is *held* that the action of the proper Government officials was in accordance with the statute and the regulations of the Civil Service Commission, and is not subject to review by the Court of Claims. *Burnap* v. *United States*, 53 C. Cls. 605, 252 U. S. 512, and other cases cited. *Baskin*, 455.

II. The fact that plaintiff in the instant case was an honorably discharged soldier does not affect the decision. *Keim* v. *United States*, 177 U. S. 290 and *Medkirk* v. *United States*, 44 C. Cls. 469, cited. *Id.*

III. Where the Director of Prisons agreed that if plaintiff, then under suspension, would make application for leave without pay, in order that he might apply for transfer to some other Government position; and where such agreement was carried out and such application for transfer was made; it is *held* that this did not give plaintiff the right to demand the position from which he had been removed or the pay thereof. *Id.*

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